

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order of
the Commissioner of Business Oversight,

OAH No. 2015071124

COMMISSIONER OF BUSINESS
OVERSIGHT

Complainant,

vs.

MAC BEAM, INC., BIA MAC, and
ANHDAO THERESA QUACH,

Respondents.

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated March 25, 2016, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on August 4, 2016.

IT IS SO ORDERED this 5th day of July, 2016.

JS
JAN LYNN OWEN
Commissioner of Business Oversight

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PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 6 and 7, 2016, in Los Angeles, California. Complainant Mary Ann Smith, Deputy Commissioner, Enforcement Division, Department of Business Oversight (Department), was represented by Johnny Vuong, Senior Counsel, and Ms. Lu, Counsel, for the Department. Phillip L.J. Sandoval, Attorney at Law, represented respondents Mac Beam, Inc., Bia Mac and Anhdao Theresa Quach. Bia Mac and Anhdao Theresa Quach were present and appeared on behalf of Mae Beam, Inc. in their capacities as former officers of the corporation.

Evidence was received. The record remained open for a telephonic status conference on January 29, 2016, and thereafter for submission of briefs and proposed language for a protective order. The following submissions were filed and marked for identification as follows:

Respondent's Proposed Language for Protective Order, January 27, 2016, Exhibit U;
Respondent's Revised Proposed Language for Protective Order, February 7, 2016, Exhibit V;
Complainant's Non-Opposition to Respondent's Revised Proposed Language for Protective

Order, February 3, 2016, Exhibit 11; Complainant's Closing Argument, February 5, 2016, Exhibit 12; Respondent's Closing Brief, February 22, 2016, Exhibit W; and Complainant's Rebuttal Brief, March 4, 2016, Exhibit 13.

During the hearing an oral protective order was issued to seal exhibit I and to seal any testimony referring to the substance of exhibit I in the event that a transcript of testimony is prepared. With input from the parties, a written protective order was issued dated January 8, 2016. The parties were permitted to submit further suggested language, and did so in exhibits V and 11. An Amended Protective Order was issued March 25, 2016, and served on counsel.

The record was closed and the matter was submitted for decision on March 4, 2016.

FACTUAL FINDINGS

The Administrative Law Judge makes the following factual findings:

1. Mary Ann Smith signed the Desist and Refrain Order in her official capacity. In summary, the Desist and Refrain Order alleges that Mac Beam, Inc. (MBI), acting through control persons Bia Mac (Mac) and Anhdao Theresa Quach (Quach), offered securities to investors in California; no permit for sale was issued by the Department; there were misrepresentations or omissions in the offering process; and the Commissioner concluded the securities were subject to qualification and were being sold without being qualified. Violations of Corporations Code sections 25110 and 25401 were alleged.¹ The Desist and Refrain Order orders MBI, Mac and Quach to desist and refrain from offering the securities for sale until qualification is made or an exemption applies, and to correct misrepresentations or omissions in the offering process. Complainant bears the burden to prove these allegations. The standard of proof is preponderance of the evidence.
2. Respondents contend that the offering is not subject to qualification, that exemptions apply, and that they made no misrepresentations. Respondents requested a hearing. Respondents bear the burden of proof to establish any exemption.
3. At all relevant times MBI was a California corporation, with its primary place of business at 10616 Garden Grove Boulevard, Garden Grove, California 92843. At all relevant times, respondent Mac and respondent Quach were control persons of MBI.
4. In 2005, MBI, through Mac and Quach, offered securities through in person solicitation to an investor, Doug Huu Nguyen (DN), in the form of MBI common stock.

¹ All statutory references are to the Corporations Code unless otherwise indicated.

Although it was alleged that securities were also offered through print advertisement, there was insufficient evidence to establish solicitation by print advertisement.

5. The securities were offered and sold by respondents MBI, Mac and Quach to DN in this state in an issuer transaction. The Department has not issued a permit or other form of qualification authorizing any person to offer and sell these securities in this state.

6. Respondents do not claim that there was any qualification of the stock offered or sold to DN. Rather, respondents contend that there is an exemption from qualification under section 25102, subdivision (f).

7. The statutory exemption claimed by respondents, section 25102, subdivision (f), contains five criteria.² Respondents established that there were less than 35 persons who purchased securities (criterion 1); DN bought the security for his own account and not for resale, as explained below (criterion 3); there was no published advertisement as part of the sale (criterion 4); and although MBI was required to file a notice of the transaction, the failure to do so does not affect the availability of the exemption (criterion 5). The evidence established that DN initially proposed to purchase the stock on behalf of his company, Cadovimcx-USA Global Joint Trade Corp (Cadovimex), but asked for the stocks to be issued in the names of his two sons, as gifts. No resale was anticipated.

8. Criterion 2 for respondents' claim of exemption is that DN, as the purchaser, must have a pre-existing personal or business relationship with respondents, or DN could be reasonably assumed to have the capacity to protect his own interests in connection with the transaction by reason of his business or financial experience, or his adviser's business or financial experience. This factor was the subject of documentary and testimonial evidence.

9. Testimony of the relationship and dealings between respondents and DN was provided by DN, Mac, Quach and, tangentially, Sdrong Nguyen. All of these witnesses suffered from lack of credibility in some aspects of their testimony, at times based on poor demeanor, the character of the testimony, capacity to recollect, evidence of bias or other motive, prior statements that were consistent or inconsistent with the testimony, the nonexistence of facts or documents that were the subject of testimony, and other factors.

10. Nevertheless, the credible testimony supports the following scenario. DN was born in Vietnam and was an air force pilot there. He told Mac that he trained in the air force and became best friends with Mac's older brother, which caused Mac to treat DN with a level of respect. DN emigrated to the United States in 1975, and in 1978 he began working for Rockwell International (Rockwell) as a fabricator. He earned a Bachelor's Degree in electrical engineering in 1983, and in 1984 Rockwell hired him as an engineer. He worked for Rockwell for 25 years. DN became self-employed in 2003. DN told Quach that his

² The pertinent language of the statute is discussed in the Legal Conclusions.

company, Cadovimex, was in the business of imports and exports and, for example, sold products to Costco. DN represented to Quach that Cadovimex had annual income of \$5 million, and that DN had annual income of \$1 million.

11. Mac developed a machine to provide low level laser light therapy under prescription by doctors. Mac and Quach formed MBI to further develop and test the technology, obtain review from the Food and Drug Administration (FDA), and market the machines. The machines were tested and/or marketed in many countries, including the United States. Quach was credible in her testimony of the developing relationship between DN and respondents. DN was interested in becoming the exclusive distributor of the machines in Vietnam. DN, Quach, Mac, and other MBI executives and employees negotiated terms of a distribution agreement.

12. According to Quach, DN was accompanied to many meetings and advised by his (DN's) attorney, Garrett Skelly. When the \$50,000 licensing fee for the distribution agreement was discussed, DN indicated he did not want to pay this amount but, rather, would pay to purchase MBI stock. To that point, MBI stock was provided only to MBI employees. The potential sale to a non-employee, as well as the terms of the sale, resulted in many meetings and communications among MBI employees, and between MBI employees and DN and Mr. Skelly.

13. DN gave a contrasting, and less convincing, version of events. DN presented the growing relationship with Quach and Mac as relating almost exclusively to efforts by Quach and Mac to have DN purchase MBI stock, including various representations they made, discussed in more detail below.

14. As of 2007 or 2008, due to subsequent events at MBI, new officers were in charge. Mac and Quach were no longer officers. Quach ceased employment with MBI in 2007 and she became a consultant until 2010. A new investor, Jenny Ta, became the Chief Financial Officer in 2007 or 2008. According to Quach, Ms. Ta took money from MBI and disappeared in 2110. MBI became inactive in 2010. Many corporate records are not now available.

15. Existing records include a Stock Purchase and Sale Agreement for the sale of 500,000 shares of MBI stock, at \$.10 per share, to DN's sons, Allan D. Nguyen and Bruce Nguyen, dated November 29, 2015. (Exhibit K.) DN and Quach agree that this agreement was preceded by an agreement for DN to purchase the stock. A Cadovimex check to "Mac Beam" for \$50,000, dated November 15, 2005, bears the memo "Stock Invest" and was deposited. (Exhibit 5.) After DN purchased the stock, DN and his wife decided to have the stock issued to their sons. Consequently, DN returned the stock certificates issued in his name. There followed the November 29, 2015 agreement listing the sons as the purchasers of the stock. DN was credible in his testimony that the stock was reissued first to just Allan Due Nguyen (exhibit 7; undated stock certificate) and then Allan Due Nguyen and Bruce Nguyen (exhibit 9; stock certificate dated November 29, 2005).

16. DN and Quach believably testified to the exchange of many documents in the process, and many discussions about them. Again, DN testified it was almost exclusively about a stock purchase while Quach said it related to the distribution agreement first, and later the stock purchase. DN and Quach agree that DN reviewed and signed a Stock Purchase and Sale Agreement for purchase by DN, which was in the same form as the later agreement listing the sons as purchasers.

17. The Stock Purchase and Sale Agreement includes representations to the effect that the purchaser (1) is able to bear the economic risk of the investment, can afford the loss of the entire investment, and after the investment will have sufficient means of providing for his current needs; (2) has had access to MBI's most recent financials and other information which the purchaser or his advisors required; and (3) is aware the stock is sold under exemptions from registration in the Corporations Code. In paragraph (2)(h), the purchaser specifically represents:

By reason of the Purchaser's business or financial experience or the business or financial experience of its professional advisors, the Purchaser has the capacity to protect his (or her) own interest in connection with this transaction or has a pre-existing personal or business relationship with Issuer or one or more of its officers, directors or controlling persons consisting of personal or business contacts of a nature and duration such as would enable a reasonably prudent purchaser to be aware of the character, business acumen and general business and financial circumstances of such person with whom such relationship exists.

(Exhibit K.)

18. In these circumstances, respondents established by a preponderance of the evidence that respondents' offers and sales of stock to DN and, subsequently to Allan Duc Nguyen and Bruce Nguyen, were exempt from registration requirements.

19. Complainant alleges that, in connection with the offer and sale of these securities, respondents made, or caused to be made, misrepresentations 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. The four alleged misrepresentations and omissions are discussed below.

20. The first allegation (Desist and Refrain Order, paragraph 6(a)) is that MBI, Mac and Quach misrepresented to investors that their investment of common stock was guaranteed a significant increase from \$0.10 to \$10.00, despite there being no market for the securities on any financial basis. DN testified to being told by Mac and Quach that (1) the stock should be sold to him for \$1 per share but they would sell to him for \$.10 per share, and (2) after an anticipated Initial Public Offering (IPO) in three months, the share price would rise to between \$5 and \$25 per share.

21. Mac and Quach denied making any such statements. Quach testified credibly that (1) there were no representations to DN of any expected rise in stock price; (2) MBI was not planning an IPO in three months; and (3) MBI's business plan was to increase sales and profits over time to a level where it would consider an IPO, which would take much longer than three months.

22. It was not established by a preponderance of the evidence that MBI, Mac and Quach made the misrepresentations alleged in the first allegation.

23. The second allegation (Desist and Refrain Order, paragraph 6(b)) is that respondents misrepresented to investors that their medical laser machine was approved by the Federal Drug Administration (FDA) for medical treatment when in fact the machine received only FDA clearance for use as an infrared lamp. DN testified in support of the allegation.

24. Mac and Quach denied making any such statements. Quach testified credibly that (1) there were different protocols to obtaining FDA clearance as opposed to requesting FDA approval; (2) FDA approval required substantially more information and documentation than FDA clearance, and MBI did not have that information and documentation; (2) FDA clearance had been received, which was necessary for MBI to market the machine; (3) extensive time was spent explaining the FDA clearance to DN and Mr. Skelly, in connection with plans for DN to be the exclusive marketer of the machines in Vietnam; (4) MBI's business plan (exhibit I) includes information on the FDA clearance; and (5) copies of the business plan were given to DN and his attorney, Mr. Skelly, as part of the negotiation of the distribution agreement and before the stock sale.

25. It was not established by a preponderance of the evidence that MBI, Mac and Quach made the misrepresentations alleged in the second allegation.

26. The third allegation (Desist and Refrain Order, paragraph 6(c)) is that Mac misrepresented to investors that he was a Medical Doctor and a Doctor of Oriental Medicine, when in fact he is not a licensed Medical Doctor or Doctor of Oriental Medicine of this state. DN testified in support of the allegation.

27. Mac testified credibly that DN asked what Mac did in Vietnam, and Mac replied that he was a doctor in Vietnam. Mac received a license in Vietnam in 1989 as an Oriental Medical Doctor. Mac credibly testified that he did not tell DN that Mac was licensed in the United States or in California as a Medical Doctor or as a Doctor of Oriental Medicine.

28. It was not established by a preponderance of the evidence that Mac made the misrepresentations alleged in the third allegation.

29. The fourth allegation (Desist and Refrain Order, paragraph 6(d)) is that Quach misrepresented to investors that she was a licensed Medical Doctor of this state, when in fact

she was licensed only as a Doctor of Oriental Medicine. DN testified in support of the allegation.

30. Quach credibly testified that (1) she graduated from South Baylo College with a Master's Degree as a doctor of oriental medicine; (2) she is licensed in California to perform acupuncture; and (3) she did not tell DN that she was licensed in California as a Medical Doctor.

31. It was not established by a preponderance of the evidence that Quach made the misrepresentations alleged in the fourth allegation.

32. Complainant did not establish by a preponderance of the evidence a factual basis to support the conclusion that, in the sale of stock to ON, respondents violated section 25110. Rather, respondents established by the preponderance of the evidence that the stock sale was exempt from registration.

33. Complainant did not establish by a preponderance of the evidence a factual basis to support the conclusion that, in the sale of stock to DN, respondents violated section 25401 by the use of misleading written or oral communications that included untrue statements of material fact, or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

CONCLUSIONS OF LAW

Based on the foregoing factual findings, the Administrative Law Judge makes the following conclusions of law:

1. Under section 25110, companies that want to sell their own securities must either have qualified the offer and sale with the Commissioner of Business Oversight (Commissioner) or must operate under a recognized exemption from the qualification requirement.

2. As relevant here, under section 25532, the Commissioner can issue a desist and refrain order when, in the Commissioner's opinion, stock is being offered or sold without being qualified under section 25110, or in violation of other applicable laws.

3. Respondents, as the seller of the stock, have the burden of establishing that the sale or offer of a security meets an exemption. (*Johnston v. Bumba* (N.D. Ill. 1991) 764 F. Supp. 1263, 1277.)

4. Under section 25102, subdivision (f), a transaction is exempt from the requirements of section 25110 if it meets certain criteria, including: there are no more than

35 such sales (subd. (f)(1)); the purchaser represents that the purchase is for the purchaser's own account, and not for resale (subd. (f)(3)); and the offer and sale cannot be accomplished by the publication of any advertisement (subd. (f)(4)). Section 25102, subdivision (f)(2) states:

All purchasers either have a preexisting personal or business relationship with the offeror or any of its partners, officers, directors or controlling persons, or managers (as appointed or elected by the members) if the offeror is a limited liability company, or by reason of their business or financial experience or the business or financial experience of their professional advisers who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction.

Section 25102, subdivision (f)(4), also requires a seller to file a notice of any sales transactions for which the exemption is claimed. However, "The failure to file the notice or the failure to file the notice within the time specified by the rule of the commissioner shall not affect the availability of the exemption. . . ." (*Ibid.*)

5. As set forth in Factual Findings 10, and 15 through 18, before or at the time DN purchased the MBI stock, he made oral statements of his financial worth and signed an agreement acknowledging the existence of facts satisfying the requirements of section 25102, subdivision (f)(2).

6. The other requirements of section 25102, subdivision (f) were met. The sale of MBI stock to DN was exempt from registration with the Department.

7. Due to the exemption, respondents did not violate section 25110 in the sale of MBI stock to DN. No cause exists to order respondents to desist and refrain from the sale of MBI stock based on alleged violations in connection with the sale of MBI stock to DN, for the reasons set forth in Factual Findings 4 through 18 and 32.

8. As relevant here, under section 25401, "it is unlawful for any person to offer or sell 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."

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9. Cause does not exist under section 25401 to order respondents to desist and refrain from the sale of MBI stock based on alleged misrepresentations or omission, for the reasons set forth in Findings 19 through 31, and 33.

ORDER

The Desist and Refrain Order issued to Mac Beam, Inc., Bia Mac and Anhdao Theresa Quach, dated October 28, 2014, is vacated.

DATED: March 25, 2016

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DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings