

**BEFORE THE  
DEPARTMENT OF CORPORATIONS  
STATE OF CALIFORNIA**

In the Matter of the Desist and Refrain Order  
Against:

OAH Case No. 2011060757

ARIF HALABY and TOTAL FINANCIAL  
SOLUTIONS, INC.,

Respondents.

**PROPOSED DECISION**

Administrative Law Judge Jankhana Desai, Office of Administrative Hearings, State of California, heard this matter on November 29, 2011, December 22, 2011, and February 6, 2012, in Los Angeles, California.

Joyce Tsai, Corporations Counsel, represented Complainant California Corporations Commissioner Preston DuFauchard, Department of Corporations (Department), State of California (State).

Timothy Fredericks and Jeremy Carr, Attorneys at Law, Winget Spadafora & Schwartzberg LLP, represented Respondents Arif Halaby (Respondent Halaby) and Total Financial Solutions, Inc. (TFS).

Oral and documentary evidence was received on November 29, 2011, December 22, 2011, and February 6, 2012. The record was held open to allow both parties to submit written closing briefs by February 21, 2012, and to thereafter allow both parties to submit written reply briefs by February 28, 2012. Both parties made timely submissions. Complainant submitted a closing brief and a reply brief, marked as Exhibits 21 and 22 respectively. Respondents submitted a closing brief and a reply brief, marked as Exhibits R and S respectively.<sup>1</sup> The record was closed and the matter submitted on February 28, 2012.

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<sup>1</sup> Respondents also submitted an "Errata to Respondents' Reply Brief" on February 29, 2012. Although received one day after the February 28, 2012 deadline, this document was marked as Exhibit T and was considered by the Administrative Law Judge as it only clarified one sentence in Respondents' closing brief.

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. On March 17, 2011, Deputy Commissioner Alan S. Weinger, on behalf of Complainant, issued a Desist and Refrain Order (Order) to Respondents. The Order alleges that Respondents conducted business as investment advisers in the State without having a certificate authorizing them to do so, in violation of California Corporations Code section 25230.<sup>2</sup> The Order also alleges that Respondents offered and sold securities in the form of common stock and promissory notes issued by Majestic Sunset Playa Azul, S.A. (Majestic) in Costa Rica, without said securities being qualified, in violation of section 25110.<sup>3</sup>

2. Respondents timely requested a hearing to challenge the Order.<sup>4</sup>

### *Respondents Halaby and TFS*

3. Respondent Halaby is the President, Chief Executive Officer, and control person of TFS, a California Corporation. Respondent Halaby started TFS in 2004, and he and his wife co-own the company. From 1996 to 2000, Respondent Halaby worked for Primerica Financial. Before that, he worked as a police officer with the Los Angeles Police Department from approximately 1989 to 2000.

4. TFS maintains a website at [www.tfswealth.com](http://www.tfswealth.com). A June 2, 2011 printout of the

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<sup>2</sup> All further statutory references are to the California Corporations Code unless otherwise noted.

<sup>3</sup> At hearing, the Department presented evidence alleging that Respondents also offered and sold rental property in Texas and Utah (rental property) that the Department argued were securities and, therefore, that Respondents were offering and selling the rental property in violation of section 25110. These transactions took place long before the issuance of the Order on March 17, 2011. The Department had ample opportunity to include the rental property transactions as a basis for the issuance of the Order, but did not do so. Additionally, although in its closing brief the Department argues that it is allowed, under the Administrative Procedure Act, to amend the pleading, the Department made no attempt to amend the Order at hearing, or even after the case was submitted for decision, to include the rental property transactions as a basis for the Order. Therefore, this Proposed Decision does not address whether the rental property transactions violated the law.

<sup>4</sup> Respondents argued that the Department did not have sufficient basis to issue the Order, and that the majority of the evidence the Department acquired was after the date of the issuance of the Order. This argument is unpersuasive. The Department did continue its investigation of Respondents after the issuance of the Order. However, the facts and evidence introduced at hearing revealed that the Department had sufficient basis to issue the Order.

website reveals that TFS advertises that it helps clients manage their money, get out of debt, and plan for retirement. At hearing, Respondent Halaby stated that he is a “financial counselor,” and that he reviews insurance and debt and budget issues clients have and offers them appropriate solutions.

5. It was undisputed that Respondents did not possess a certificate from the Commissioner, as required by section 25230, to act as investment advisers in the State at all times relevant to the allegations in the Order.

6. According to a web print-out from the Department of Insurance’s website, Respondent Halaby holds the following licenses with the Department of Insurance: (1) Life-Only: active from November 1996 through November 2012, (2) Casualty Broker-Agent: active from January 1998 through November 2012, (3) Accident and Health: active from November 1996 through November 2012, (4) Property Broker-Agent: active from January 1998 through November 2012, and (5) Variable Contracts: active from March 1998 through November 2012.<sup>5</sup> Through these licenses, Respondent Halaby is able to sell insurance products.

7. Respondent Halaby hosts a weekly radio show on KHTS AM 1220, a station located in Santa Clarita, California. The show, which has held different names, is currently called “Total Financial Safer Money Hour.” During the radio shows, Respondent Halaby talks about topics such as saving money, planning for retirement, debt management, and scam avoidance. TFS’s website contains a link that allows visitors to hear podcasts of radio shows hosted by Respondent Halaby.

8. The Department did not present evidence that Respondent Halaby offered investment advice regarding securities on his radio show.

9. TFS has an educational arm called Total Money School (TMS), a subsidiary of TFS. TMS is advertised as a “curriculum based financial education company designed to fill the gap left by traditional public and private schools.” Through TMS, Respondent Halaby teaches “Money Basics,” a course designed to provide an understanding of money and how it works. Clients are to pay a fee for the course. Respondent Halaby has also been a speaker at “Money Camps,” events at which Respondent Halaby also discusses general financial principles.

*William Schrack*

10. William Schrack (Schrack) attended one of Respondent Halaby’s Money Camps in Santa Barbara in approximately March 2007. Schrack met with Respondent Halaby shortly thereafter to discuss the possibility of Respondent serving as his financial adviser. Schrack was 80 years old at that time and was suffering from health issues. Marilyn Grosboll (Grosboll), Schrack’s live-in caretaker and friend, accompanied Schrack to the meeting with Respondent

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<sup>5</sup> At hearing, Respondent testified that his Variable Contract’s license is no longer active.

Halaby, and participated in the subsequent relationship with Respondent Halaby. At the meeting, Respondent Halaby informed them that he had a track history of helping people generate cash flow. Based upon Respondent Halaby's advice, Schrack refinanced his home to allow him to have investing capital. Schrack provided \$500,000 to Respondent to invest because Respondent assured him that the investments would provide Schrack an additional \$5,000 per month in income. Respondent Halaby represented to Schrack that he would invest Schrack's money in low risk investments.

11. In 2007, Respondent Halaby sold Schrack insurance products for which he received commission.

*Dawn Hampton*

12. Dawn Hampton (Hampton) met Respondent Halaby by attending a Money Camp event in Santa Barbara, in November 2004. Hampton explained that Respondent was one of the speakers at the event and he spoke on topics including money management, wealth building, debt payment, stocks, other investments, and credit card billing. Shortly thereafter, Hampton wrote Respondent Halaby a letter asking him to mentor her on how to build wealth. Hampton testified that she felt she could trust Respondent Halaby since he was a former police officer. When Hampton next met with Respondent Halaby, she informed him about her life history, family, education, religion, and finances. Sometime thereafter, Respondent Halaby sold two life insurance policies to Hampton and her husband.

13. Respondent Halaby also asked Hampton to work for TFS. In 2009, Hampton worked part-time as an insurance agent for TFS. On at least one occasion, Hampton appeared as a guest speaker on Respondent Halaby's radio show.

*Majestic*

14. Majestic Sunset Playa Azul (Majestic) is a resort and spa in Costa Rica consisting of single-family homes, condominiums, villas, and suites. According to a Majestic brochure, in August 2006, an investment group led by majority partner, Douglas Gould (Gould), purchased Majestic.<sup>6</sup>

15. Majestic shares and promissory notes are securities as that term is defined by California law.<sup>7</sup>

16. These securities were offered for sale or sold in this State in issuer transactions.

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<sup>6</sup> On March 25, 2009, the Department issued a Desist and Refrain order to Gould and John Calhoun, the control persons of Majestic Sunset Playa Azul S.A. corporation, ordering Gould, Calhoun and Majestic to desist and refrain from offering and selling Majestic securities in the State.

<sup>7</sup> Respondents did not dispute that these were securities.

17. Before a security is sold in California, it first must be qualified with the Department unless an exemption exists. The Department has not issued a permit or other form of qualification authorizing any person to offer and sell Majestic securities in the State. Respondents did not present any argument or evidence claiming that Majestic is exempt from qualification.

*Schrack and Majestic*

18. Schrack learned about Majestic from Respondent Halaby. Respondent Halaby advised Schrack that Majestic would be a safe, wise, and good investment for him. Based upon the representations Respondent Halaby made about Majestic to Grosboll and Schrack, they believed that Respondent Halaby had done the necessary “due diligence“ about the investment. Respondent Halaby invited Schrack and Grosboll to visit Majestic with him in August 2008 for the purpose of having Schrack invest in Majestic. Grosboll testified that Respondent Halaby led Schrack and Grosboll to believe that he co-owned Majestic. In Costa Rica, Respondent Halaby introduced Schrack to Gould. This was the first time Schrack met Gould. Within a couple of days after returning from Costa Rica, on August 20, 2008, Schrack made a \$100,000 loan to Majestic for which he received a promissory note for which Schrack was expecting to receive profits in the form of interest payments at a rate of 15 percent per annum. Schrack also purchased \$50,000 of shares in Majestic.<sup>8</sup> Respondent Halaby had asked Schrack to come to the TFS office in Santa Barbara to sign the promissory note reflecting the Majestic loan. Although the actual note was signed by Gould, Respondent Halaby directed Schrack to sign the note and Schrack signed the promissory note at the TFS office with Gould and Respondent Halaby present. Schrack wire transferred \$100,000 out of funds that Respondent Halaby was managing on his behalf. The wire transfer letter, dated August 21, 2008, states in part: “Should you have any questions please contact my adviser’s assistant, Matt Anderson, at 661-753-9683.“ Matt Anderson was Respondent Halaby’s assistant.

19. When Schrack signed the promissory note, he believed that he was making a loan to Respondent Halaby and Gould. At the end of six months, Schrack never received the 15 percent interest income. On August 20, 2010, Schrack wrote a letter to Respondent Halaby expressing his frustration and disappointment, in part, regarding the Majestic investment.<sup>9</sup> He wrote:

So let’s review where the case flow on my portfolio with you stands today. I followed your advice 100% in the portfolio below and it does total \$500K which is the amount you said you could absolutely convert into my \$5K/monthly cash flow minimum by May, 2011.

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<sup>8</sup> The evidence did not establish the date Schrack purchased these shares.

<sup>9</sup> Grosboll typed and helped draft the letter, which was signed by Schrack.

Amount Invested	Investment Location	Amount of CF <sup>10</sup>
1) \$125,000 Investment	Oakwater (film making company)	0
2) \$50,000 Share	Sanctuary in Costa Rica	0
3) \$100,000 Promissory note	Arif and Doug for Sanctuary loan	0
4) \$30,000 Interest due as of 8/10	Promissory loan @ > 15% every 6 mos.	0
5) \$10,000 Coins	Silver & Gold	0
6) \$177,000 Rental investments x 3	Vernal Utah x 2 + DeSoto, Texas x 1	-\$500-1K/mo

Items two and three in the chart above refer to the Majestic securities. Further referring to the Majestic investment, Schrack wrote:

My present suggestion is that you begin to pay me \$1,250/month (instead of the \$7,500 every 6 months) on the 15% interest rate that you owe me for the promissory note you had me sign in your office 2 years ago. Since you are now ready to pay into my account, this would be the most accountable thing you could do.

He further wrote:

The truth is – I never would have loaned you and your best friend (Doug) a penny had you not assured me it was both a **safe** and **wise** thing for me to do. If you are unwilling to start this month paying the honest interest you promised I would receive, I need to know that reality. If you are willing to be accountable to your word, bring your first \$1,250 check to our next appointment here in Santa Barbara this Wednesday on Aug. 26<sup>th</sup>.

*Hampton and Majestic*

20. Respondent Halaby also told Hampton about Majestic, advising her that it would be a good investment for her and that she would receive a good return on her money. He invited her to visit Majestic in Costa Rica, and told her that she could stay at the property at no cost to her, leading Hampton to believe that he co-owned the property. Hampton never visited Costa Rica. On August 20, 2008, Hampton made a \$50,000 loan to Majestic for which she received a promissory note, for which she was expecting to receive profits in the form of interest payments at a rate of 15 percent per annum. Again, the promissory note was signed by Gould in the TFS office in Santa Barbara with Respondent Halaby being present for part of the meeting. Although August 20, 2008 was the first time Hampton met Gould, she had received a Subscription Agreement and Shareholder's Agreement via email from Gould. Hampton

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<sup>10</sup> CF stands for cash flow.

testified that her “contact person“ for the Majestic investment was Respondent Halaby. She also explained that Respondent Halaby provided more information about Majestic than Gould did. Hampton also testified that Respondent Halaby directed Hampton to make payment into an escrow trust account. Hampton testified that she did not know if Respondent Halaby received compensation for Majestic, but that she is aware that Respondent Halaby brought many investors to the table. On July 23, 2009, Respondent forwarded Hampton an email about a meeting regarding the Majestic investment.

### *Respondents' Position*

21. Respondent Halaby claimed that he did not receive any compensation from the sale of Majestic and in fact, that he never received compensation for any investment advice he gave. He testified that the only compensation he received was in conjunction with the insurance products that he sold. He did admit to giving Schrack “investment advice in the broadest sense,” but testified that he did it as a way of “giving back,” and denied receiving compensation for his advice. He claimed that he did not advise Schrack to refinance the mortgage on his house and that Schrack had done that before he met Respondent Halaby, but this testimony was not consistent with the other, more credible evidence offered at hearing.

22. Respondent Halaby admitted that he told Schrack and Hampton that Majestic was a good investment. He also admitted to introducing them to Gould. Respondent Halaby testified that he had met Gould at an event and had started a non-profit with him. Respondent Halaby claimed that he, too, was an investor in Majestic and also lost money. He further claimed that the only ownership interest he maintained in Majestic was that of an investor. He testified that he visited Majestic approximately eight times. He also explained that Schrack and Grosboll paid their own cost for the trip to Costa Rica. He admitted that the promissory notes were signed in his office, but minimized his involvement by claiming that they were just using his office space. Respondent Halaby testified that he “probably” “popped in to say hello.” Respondent Halaby also pointed to the fact that Gould was the signer of the promissory notes.

23. Irving Mark Einhorn (Einhorn), who formerly worked for the Securities and Exchange Commission in several different capacities from 1972 to 1989, testified as a paid expert on behalf of Respondents. He opined that Respondent Halaby was not selling Majestic securities; rather, he opined that Respondent Halaby was just making an introduction between buyer and seller. However, this opinion is not persuasive given that it does not adequately account for Respondents' involvement in the offer to sell Majestic securities.

### *Additional Findings of Fact*

24. The evidence at hearing did not establish that Respondents received compensation for advising Schrack and Hampton to invest in the sale of Majestic. The testimony of Schrack, Grosboll, and Hampton evidence that, although they believed that Respondents were earning commissions on certain products, these individuals did not compensate Respondents for the advice to invest in Majestic securities. The Department did not produce evidence supporting its allegation that Respondents received compensation for the sale

of Majestic. Without this evidence, the Department cannot establish that Respondents acted as investment advisers in the State with respect to Majestic securities.

25. Whether Respondents were compensated for the sale of Majestic securities is not dispositive of whether Respondents offered and/or sold Majestic securities. Respondents' actions, as set forth in Factual Findings 18 through 23, show that Respondents offered to sell Majestic securities.

## LEGAL CONCLUSIONS

1. Section 25009 states in part:

(a) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, publishes analyses or reports concerning securities. . . .

(b) "Investment adviser" also includes any person who uses the title "financial planner" and who, for compensation, engages in the business, whether principally or as part of another business, of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of a regular business, publishes analyses or reports concerning securities. . . .

2. Section 25230, subdivision (a) states:

(a) It is unlawful for any investment adviser to conduct business as an investment adviser in this state unless the investment adviser has first applied for and secured from the commissioner a certificate, then in effect, authorizing the investment adviser to do so or unless the investment adviser is exempted by the provisions of Chapter 1 (commencing with Section 25200) of this part or unless the investment adviser is subject to Section 25230.1.

3. Section 25110 states:

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.

4. Section 25017 states in part:

(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.

5. Section 25019 states in part:

"Security" means any note; stock; treasury stock; membership in an incorporated or unincorporated association; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; viatical settlement contract or a fractionalized or pooled interest therein; life settlement contract or a fractionalized or pooled interest therein; voting trust certificate; certificate of deposit for a security...

6. The shares of Majestic are securities within the meaning of section 25019. The promissory notes Respondents offered are securities within the meaning of the Corporate Securities Law of 1968. (See Corp. Code, § 25019; *People v. Walberg* (1968) 263 Cal.App.2d 286, 291; *People v. Schock* (1984) 152 Cal.App.3d 379, 387-389; *Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 815; *Moreland v. Dept. of Corps.* (1987) 194 Cal.App.3d 506, 513.)

7. Respondents offered to sell Majestic securities to Schrack and Hampton. Respondent Halaby admitted that he advised Schrack and Hampton that Majestic would be a good investment. He also admitted that the promissory notes transactions of both Schrack and Hampton took place in the office of TFS. He invited Schrack, Grosboll and Hampton to visit Majestic and told Hampton that she could stay there for free. He led the buyers to believe that he was a co-owner in Majestic. He provided information to the buyers, and directed Hampton where to send the money.

Respondent Halaby claims that he merely introduced Schrack and Hampton to Gould. This introduction, he argues, does not amount to an offer for sale of a security or for the solicitation of an offer to buy. Respondents rely on *Freeman v. Jergins*, (1954) 125 Cal.App.2d 536, to support their position. In their closing brief, Respondents cite *Freeman* to stand for the

proposition that if a mutual friend brings together a buyer and seller of a security, this does not result in a solicitation of sale even if the intermediary was expecting to be paid for the introductions. (*Id.* at p. 551) Respondents' reliance on *Freeman* is misplaced. Respondents' statements, acts, and representations, all taken together, need to be evaluated. The question as to whether Respondents' actions amounted to an offer to buy securities can be answered by looking at the specific facts in this case. (*Id.* at p. 552.) Respondents' involvement in the both Schrack's and Hampton's transactions exceeded a mere introduction of buyer and seller. To claim that the sum of his actions amounted to nothing but a mere introduction is disingenuous. Rather, Respondents' actions amount to an "offer" to sell a security, which comes within the definition of sections 25017 and 25110. Whether Respondents received compensation for making such an offer does not affect the analysis under section 25110. Section 25110 does not require that Respondents receive compensation from offer of the sale of Majestic; it only requires the offer of sale of securities for value.

8. Respondents offered Majestic securities. Respondents' offering of unqualified, non-exempt securities in issuer transactions in California violated section 25110. Respondents did not establish any exception to the qualification requirement.

9. Cause exists to sustain the Order, pursuant to section 25532, as set forth in Factual Findings 3, and 14 through 25, and Legal Conclusions 3 through 8.

10. The Department did not establish that Respondent Halaby offered investment advice regarding securities on his radio show.

11. The Department did not prove that Respondents received compensation for the investment advice regarding Majestic securities that he offered to Schrack and Hampton. The Department did not offer evidence showing the Respondents received any form of compensation from the sale of Majestic securities, such as whether Gould provided commission to Respondents for the solicitation of buyers. Without proof that Respondents received compensation for the offer of Majestic securities, it cannot be found that Respondents violated section 25230. Therefore, Respondents did not act as investment advisers within the meaning of section 25009, and did not violate section 25230.

12. Cause does not exist to sustain the Order with respect to an alleged violation of section 25230, as Respondents did not conduct business as investment advisors in this State, by reason of Factual Findings 3 through 25 and Legal Conclusions 1, 2, 10, and 11.

## ORDER

The Desist and Refrain Order against Respondents Arif Halaby and Total Financial Solutions, Inc., issued on March 17, 2011, shall be affirmed in part and rescinded in part:

1. The Desist and Refrain Order against Respondents Arif Halaby and Total Financial Solutions, Inc. for violations of Corporations Code section 25110 is AFFIRMED.
2. The Desist and Refrain Order against Respondents Arif Halaby and Total Financial Solutions, Inc. for violations of Corporations Code section 25230 is RESCINDED.

DATED: March 29, 2012

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JANKHANA DESAI  
Administrative Law Judge  
Office of Administrative Hearings