BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

ACCEPTED FOR FILING
Date Jan. 2, 2002
By _____
DEPARTMENT OF CORPORATIONS

In the Matter of the
DESIST AND REFRAIN ORDERS
Issued To:

NAULLIE ELIZABETH GYNES
354 S. Lower Sacramento Road
Lodi, California 95242

Respondent.

OAH No. N2001090179

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on Jan. 2, 2002.

IT IS SO ORDERED Jan. 2, 2002.

Commissioner of Corporations

BY _____

OAH 15 (Rev. 6/84)

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In the Matter of the DESIST AND REFRAIN ORDERS Issued To: NAULLIE ELIZABETH GYNES 354 S. Lower Sacramento Road Lodi, California 95242 Respondent.	OAH No. N2001090179

PROPOSED DECISION

Administrative Law Judge M. Amanda Behe, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on October 11, 2001.

Daniel P. O'Donnell, Corporation Counsel, represented the State of California, Department of Corporations.

Respondent Naullie Elizabeth Gynes represented herself.

The record remained open for receipt of written closing argument. The Department's Closing Argument was received on October 25, 2001, as Exhibit 15. No Closing Argument was filed by or on behalf of respondent by the due date of November 16, 2001. No communication was received from respondent regarding the failure to file Closing Argument. The record was closed on November 16, 2001, and the matter was submitted.

FACTUAL FINDINGS

1. William Kenefick as Acting Commissioner of Corporations of the State of California, Department of Corporations (hereinafter "the Department") made and filed the DESIST AND REFRAIN ORDERS in his official capacity on April 18, 2000.

2. The Department is the agency of the state responsible for enforcement of the Corporate Securities Law (hereinafter "CSL"), California Corporations Code section 25000 et seq.

3. On April 18, 2000, Naullie Elizabeth Gynes (hereinafter "respondent") was personally served with the DESIST AND REFRAIN ORDERS, a letter advising her of the right to an administrative hearing if she challenged the DESIST AND REFRAIN ORDERS, and copies of relevant statutes.

4. The DESIST AND REFRAIN ORDERS were filed pursuant to the authority of Corporations Code section 25532. The DESIST AND REFRAIN ORDERS demanded that respondent desist and refrain from the offer or sale of promissory notes or of any other security in violation of Corporations Code section 25110 because the sale of such securities is subject to qualification pursuant to the Code and such securities were being or had been offered for sale without first being qualified.

The DESIST AND REFRAIN ORDERS further demanded that respondent desist and refrain from effecting any transaction in, or inducing or attempting to induce the purchase or sale of any security because respondent was or had been acting as a broker-dealer, and was subject to licensing as a broker-dealer pursuant to Corporations Code section 25210, and was not licensed as a broker-dealer in the State of California.

The DESIST AND REFRAIN ORDERS further demanded that respondent desist and refrain from offering or selling or buying or offering to buy any security, including but not limited to promissory notes, 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 not misleading in the circumstances, because respondent was or had been offering or selling such securities in violation of Corporations Code section 25401.

5. Pursuant to Corporations Code section 25532(d) a request for a hearing pursuant to the Administrative Procedures Act, Government Code section 11500 et seq., may be filed within a year of the date of service of such a desist and refrain order.

6. Respondent sent an undated letter to the Department which was received on June 14, 2001. Respondent apparently intended the somewhat confusing letter to be considered a request for a hearing. By its letter of June 21, 2001, the Department sought clarification of her intention and suggested language which she could use to request a hearing, including an extension of time.

Respondent's letter of July 14, 2001, employed the suggested language and was accepted by the Department as a timely request for a hearing pursuant to the Administrative Procedures Act.

7. On September 19, 2001, respondent was properly served with the Notice of Hearing setting the matter for October 11, 2001.

8. Corporations Code section 25110 provides, in pertinent part, that:

"[i]t is unlawful for any person to offer or sell in this state any security...unless such sale has been qualified...or unless such security or transaction is exempted or not subject to qualification...."

9. Corporations Code section 25210 provides, in pertinent part, that:

"(a) [u]nless exempted under the provisions of Chapter 1...of this part, no broker-dealer shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in this state unless the broker-dealer has first applied for and secured from the commissioner a certificate, then in effect, authorizing that person to act in that capacity.
"(b) No person shall, on behalf of a broker-dealer licensed pursuant to Section 25211, or on behalf of an issuer, effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in this state unless that broker-dealer and agent have complied with any rules as the commissioner may adopt for the qualification and employment of those agents."

10. Corporations Code section 25003 defines "agent" as:

"... any individual, other than a broker-dealer or a partner of a licensed broker-dealer, who represents a broker-dealer or who for compensation represents an issuer in effecting or attempting to effect purchases or sales of securities in this state."

11. Corporations Code section 25504 defines "broker-dealer" as:

"...any person engaged in the business of effecting transactions in securities in this state for the account of others or for his own account." "Broker-dealer" does not include an agent "when an employee of a broker-dealer or issuer."

12. Title 10, California Code of Regulations, Title 10, Chapter 3, Rule 260.216.16 states that:

"[i]t shall constitute a 'fraudulent, deceptive, or manipulative act or practice' as used in subsection (b) of Section 25216 of the Code, for any agent, officer, director, partner, managing employee or controlling person of a broker-dealer to become concurrently associated with another broker-dealer or with an issuer as an agent officer, director, partner, managing employee or controlling person unless prior to establishing such concurrent affiliation (i) such person gives written notice to both affiliates regarding such dual relationship, , (ii) both affiliates consent to such concurrent affiliation, (iii) both affiliates establish appropriate procedures designed to correct any conflict of interest arising out of such relationship and to guard against violations...."

13. Respondent was a registered agent with Financial Network Investment Corporation (FNIC), a licensed broker-dealer, from April 10, 1989 to December 17, 1996. Respondent testified that she did little work with her securities license until she lost her teaching job due to a decrease of federal funding in the early 1990's.

14. On a date not established by the record David Hartgraves and his wife met respondent, who purchased items from their clothing business. Respondent represented that she worked in investments. Eventually David Hartgraves and his wife moved their Individual Retirement Account (hereinafter "IRA") from a financial institution to FNIC as respondent's clients. Mr. Hartgraves described that thereafter respondent recommended various investments for his consideration and he "collaboratively" agreed with most of her suggestions. Mr. Hartgraves received regular statements regarding the IRA account when respondent was at FNIC.

15. Respondent offered disjointed and confusing testimony regarding a business named "Entrust" with which she was associated as a partner. It is unclear from the record whether FNIC knew of her association with Entrust, or whether her activities with Entrust overlapped her active association with FNIC. Respondent testified that her partner in Entrust misused funds, and that she was unable to disassociate herself from the firm despite her best efforts. There were financial difficulties and disputes with her Entrust partner.

16. Respondent's testimony displayed considerable naivete about the complexities of investing, and wholesale ignorance of the provisions of the Corporations Code. For example, she testified that "after my teaching job ended I decided to be an investment broker." She also stated that after all the financial and other problems at Entrust "I thought I would start an IRA association of my own."

17. In approximately March 1995 respondent formed "Envest Financial Group," a self-directed IRA business. She borrowed money from two friends, one of whom was Patrick Kimmel, to start the business, and a third person invested $10,000 in the firm. Respondent opened a trust account for the business at the Bank of Agriculture and Commerce in Stockton, California. Respondent's business was unsuccessful and she fought with her colleague who eventually left after two years. Respondent described that she was not making any money and "bills were hanging around my neck." She did not repay any part of the loans.

18. Respondent moved the IRA account of David Hartgraves and his wife from FNIC to her own business, Envest Financial Group. Mr. Hartgraves did not receive regular account statements after respondent started her own business. He apparently trusted respondent and believed that his IRA account was safe in her care.

19. In 1996 respondent suggested to Mr. Hartgraves that he invest some of the money in his Envest IRA account in a promissory note, which respondent claimed would be a better investment than stocks or a bank deposit. Respondent represented that the promissory note would be a $5,000 second mortgage at 8½ percent interest over five years.

Mr. Hartgraves did not know to whom the money would be loaned, i.e. the obligee on the promissory note. Respondent did not disclose any risk associated with the transaction. Respondent never told Mr. Hartgraves that the money was really for her benefit or that she would keep $2,000 of the money. She did not disclose that she owed Patrick Kimmel $3,000, or that she would use the money to pay off an earlier $3,000 loan from Patrick Kimmel which she used to start Envest. She never told Mr. Hartgraves that Patrick Kimmel had no intention of paying him back, or that Patrick Kimmel understood she would make the payments. Respondent never told Mr. Hartgraves that she had failed to repay Patrick Kimmel on the $3,000 loan of several years before.

Mr. Hartgraves testified that it would have been important for him to know that respondent had a side agreement with Patrick Kimmel that he would keep $3,000 of the sum taken from his IRA account and that she would retain $2,000. Respondent never disclosed that plan.

20. On May 1, 1996, respondent removed $5,000 from Mr. Hartgraves' Envest IRA account. She gave Mr. Hartgraves a promissory note which provided for 8½ percent interest, with interest payments due on the fifteenth day of each month, beginning on June 15, 1996. The note did not identify any security for the $5,000, or any termination date. Based on respondent's representations Mr. Hartgraves believed that it was a five-year note representing a second mortgage, i.e. secured by property. The promissory note was signed by Patrick Kimmel as the Obligee/Maker.

21. Respondent used $3,000 of the $5,000 from Mr. Hartgraves' IRA account to pay Patrick Kimmel the sum he had loaned to her several years previously. Respondent kept the remaining $2,000 and used that sum for her own purposes.

22. Respondent did not qualify the promissory note with the Department of Corporations.

23. Respondent did not request nor receive approval to offer or sell promissory notes from FNIC, her broker-dealer at the time of the transaction.

24. Mr. Hartgraves never received any interest payments on the promissory note or documentation from respondent other than the note itself. Respondent did not provide any account statements that reflected that payments were being made on the promissory note. When Mr. Hartgraves attempted to obtain information at the Envest office in 1998 he was told that respondent had left the company.

Mr. Hartgraves checked at the Bank of Agriculture and Commerce in Stockton where his self-directed IRA account was maintained and was told that it had been liquidated by respondent. Respondent did not provide prior notice that his account would be moved. When he contacted respondent she provided no explanation for failing to notify him of her separation from Envest and moving his account to a new bank. Mr. Hartgraves was surprised to discover that respondent was using a new firm name, Envestacorp.

25. Richard Dunsing, a Deputy with the San Joaquin County Sheriff's Office for 25 years, and Deputy Sam Malcolm were assigned to investigate a complaint filed by Mr. Hartgraves. Their investigation, which was assigned Case No. 1998-17645, included obtaining evidence from respondent and Mr. Hartgraves and interviewing them and others.

26. On August 12, 1998, the deputies interviewed Mr. Hartgraves and his wife Cathy who described that respondent arranged their short-term investment reflected in the promissory note. They advised that they had not been paid any money on the note or received any documentation from respondent. When they finally located respondent she claimed that the entire $5,000 had been eaten up by service charges. They were also concerned that Patrick Kimmel was respondent's boyfriend.

27. Around August 16, 1998, Mr. Hartgraves contacted Patrick Kimmel at his home and demanded payment of the $5,000 note. Patrick Kimmel responded that he did not know what Mr. Hartgraves was talking about. Mr. Hartgraves showed him the promissory note that bore the signature "Patrick Kimmel."

28. On August 22, 1998, Deputies Dunsing and Malcolm interviewed respondent in the garage of her home. Deputy Dunsing opined that it was unusual that she kept them in the garage during the interview. Respondent refused to let the deputies in her home, stating that she had friends over.

The deputies said they were present to investigate the promissory note. Respondent stated that she was the sole owner of Envest Financial Group. When asked for documentation regarding the promissory note respondent entered her house and after a delay returned with a document captioned "Statement of Accounts (sic)" for David Hartgraves. Next to a printed notation of "Promissory Note" on the computer-generated statement was the handwritten notation "note to PK." When questioned respondent first stated that the initials "PK" concerned a "Paul Kennedy." When questioned further respondent stated she did not know Paul Kennedy and the note had been set up by Mr. Hartgraves and Paul Kennedy.

Respondent then entered her house to get her driver's license, which the deputies requested to establish her identity. While she was in the house Patrick Kimmel arrived at the residence, approached the deputies in the garage, and said he thought they needed to talk to him but that it would have to be elsewhere. He identified himself by name. Patrick Kimmel entered respondent's house without knocking.

Respondent then returned to the garage. The deputies asked her if she knew Patrick Kimmel and she replied that she could only recall meeting him maybe once. When asked the identity of the man was who had just entered her house without knocking respondent admitted it was Patrick Kimmel. She also admitted to the deputies that she was the one who approached Mr. Hartgraves about investing in the promissory note, and that the initials on the statement pertained to Patrick Kimmel.

Deputies Dunsing and Malcolm asked respondent about the claimed service charges on Mr. Hartgraves' account. She reentered her house and after a lengthy period of time returned to the garage with a handwritten page which she claimed was an account ledger for the period October 1997 through August 1998. It reflected that $2,500 of the $5,000 had been repaid. Deputy Dunsing noted that the dates of the entries were not in chronological order, and that the various entries appeared to have been hastily made while they waited in the garage.

When asked if she had received any payments from Patrick Kimmel on the promissory note respondent stated that $2,500 had been repaid. The deputies asked if she could produce documentation of the payments and she stated she could. Respondent then reentered her house. Several minutes later she returned with amounts written on a piece of scratch paper. When again asked for documentation of payments respondent stated she had that on her computer but it would take some time to get it. She went back in the house and was gone for fifteen minutes. Although she claimed the information had to be retrieved from her computer she came back with a typed document, a purported letter to Mr. Hartgraves dated the preceding day, August 21, 1998, and captioned "Deposit to Account of David Hartgraves". The letter had five entries that listed ostensible payments totaling $2,500 to Mr. Hartgraves' account.

The deputies asked respondent if she sent out monthly account balances to her clients, and she stated she sent out quarterly statements. She then claimed that since she had recently made a change in corporations the first statements to her approximately 37 clients would not be issued for a couple of weeks. She had recently renamed her business Envestacorp and moved all the funds from the Bank of Agriculture and Commerce in Stockton to the Bank of Lodi as of August 1, 1998.

Respondent admitted to the deputies that she did not have a broker's license from December 1996 through August 1997. She claimed that she was currently affiliated with Royal Alliance/Life Plans.

29. Respondent never provided to Mr. Hartgraves the purported ledger page reflecting that $2,500 of the $5,000 had been repaid, or the August 21, 1998, typed letter. The evidence established that she created those documents while the deputies were waiting in her garage, and that she falsified those items to thwart their investigation. She lied to the deputies that she did not know Patrick Kimmel or had met him only once when in fact they were close friends and he had made loans to her.

30. Deputies Dunsing and Malcolm also interviewed Patrick Kimmel, who acknowledged that he and respondent had been very good friends for about seven years. Patrick Kimmel advised the deputies that in 1993 or 1994 he had made a loan of $3,000 to respondent to get her business, Envest Financial Group, started.

Respondent never repaid the loan, and when he asked her for repayment said she did not have the money. Respondent said the only was she could get the money was to borrow from her IRA, but she could not make a loan against her IRA without tax consequences. She proposed that if he would take out a promissory note for $5,000 she would give him a check for $5,000, and that he should keep $3,000 and write her a check for the remaining $2,000. She would then make payments back into her IRA. Respondent represented to Patrick Kimmel the source of the $5,000 was her IRA, and did not disclose that the money would come from Mr. Hartgraves' IRA account.

In May 1996 respondent brought over the promissory note for $5,000 and Patrick Kimmel signed it. He received $3,000 from respondent to pay off the earlier $3,000 loan used to start Envest. Patrick Kimmel had no intention of making payments on the promissory note, and understood that respondent would make the payments.

Patrick Kimmel also disclosed that respondent, who claimed to have business problems, borrowed an additional $5,000 from him in 1996. She signed a promissory note at 10% for that sum, and never made any payments on the loan. Patrick Kimmel confirmed that the loans were made to respondent personally and that he had no investment in her business.

31. On August 26, 1998, Patrick Kimmel again met with Deputies Dunsing and Malcolm. He provided them with the May 1, 1996 "Simple Promissory Note" he signed for $5,000 to David Hartgraves "payable at Envest Financial Group." A page was attached to the note which contained his and respondent's signatures and the date May 6, 1996 under the following paragraph:

> "THIS NOTE WAS SIGNED BY ME IN (sic) BEHALF OF NAULLIE GYNES. IN THE EVENT OF ACCIDENT OR DEFAULT IS (sic) TO BE PAID BY NAULLIE GYNES, IRA NUMBER 007-01-1125."

Patrick Kimmel also provided a different page captioned "Attachment to Promissory Note No. 007-01-2263 Signed & Dated 5/1/96 for $5,000.00." The page stated:

> "This note (007-01-2263) was signed by Patrick Kimmel in (sic) behalf of Naullie Gynes. In the event of accident or default said note is to be paid by Naullie Gynes, IRA number 007-01-1125."

Respondent and Patrick Kimmel signed the page beneath the note, and dated their signatures May 6, 1996.

Neither of the attachments to the promissory note were provided to Mr. Hartgraves by respondent.

32. On approximately August 25, 1998, shortly after she was aware of the investigation by the San Joaquin County Sheriff's Office, respondent mailed a Bank of Lodi official check for $5,774 to Mr. Hartgraves. Respondent purchased the official check with funds from the Envestacorp Financial, Inc., trust account.

33. Jeff Robertson, a certified fraud examiner, obtained respondent's bank accounts pursuant to a subpoena and reviewed them for compliance with the Corporations Code. Mr. Robertson's review established that on August 5, 1998, respondent transferred trust funds totaling $86,979.23 held by Envest Financial Group at the Bank of Agriculture and Commerce in Stockton to a new account at the Bank of Lodi.

34. Trust funds by definition are monies segregated from personal and business funds. Respondent displayed ignorance of the purpose of trust accounts and her obligations with regard to funds held in trust. Respondent testified that in addition to client funds the trust account at the Bank of Agriculture and Commerce included her Social Security checks, a settlement payment she received from the school district which employed her, and money she received from her ex-husband.

35. Mr. Robertson's review established that respondent used funds held in trust by Envestacorp Financial, Inc., at the Bank of Lodi to repay the $5,774 to Mr. Hartgraves. Respondent purchased the official check with funds from the Envestacorp Financial, Inc., client trust account (Bank of Lodi trust account No. 0101130616). Respondent's use of funds held in trust for the benefit of clients to repay the promissory note which represented her personal indebtedness was impermissible.

36. Respondent's testimony that the promissory note was secured by her home was wholly lacking in credibility. Neither respondent nor her home were identified on the note. Respondent admitted at hearing that she has no evidence that her home was collateral for the note.

37. Respondent's testimony that she did not sell a promissory note to Mr. Hartgraves was wholly lacking in credibility. Her claim that he knew he was investing money in her business or to her personally was also not credible. The evidence clearly established that respondent produced the promissory note expressly to mislead Mr. Hartgraves about the nature of the transaction. She falsely represented that the promissory note would be a second mortgage, and that Patrick Kimmel was the person obligated to repay the note.

38. The promissory note is clearly a note or evidence of indebtedness or investment contract within the parameters of Corporations Code section 25019, and the holding of the Supreme Court regarding unsecured promissory notes in People v. Simon (1995) 9 Cal. 4th 493. Respondent was required to qualify the promissory note with the

Department pursuant to Corporations Code section 25110 which provides, in pertinent part, that "[i]t is unlawful for any person to offer or sell in this state any security...unless such sale has been qualified...or unless such security or transaction is exempted or not subject to qualification...."

39. Respondent violated the Corporations Code and related regulations when she offered and sold the promissory note to Mr. Hartgraves without the permission or oversight of her broker-dealer, FNIC. In consequence she was not acting as an "agent" but rather as a broker-dealer. She was not certificated as a broker-dealer with the Department at the time of the offer and sale of the promissory note or at any other time.

LEGAL CONCLUSIONS

1. Cause for issuance of the Department's DESIST AND REFRAIN ORDERS was established pursuant to Corporations Code sections 25532 and 25110 in that respondent offered and sold a security subject to qualification pursuant to the Code without first being qualified.

2. Cause for issuance of the Department's DESIST AND REFRAIN ORDERS was established pursuant to Corporations Code sections 25532 and 25110 in that respondent acted as a broker-dealer, and was subject to licensing as a broker-dealer pursuant to Corporations Code section 25210, and was not licensed as a broker-dealer in the State of California.

3. Cause for issuance of the Department's DESIST AND REFRAIN ORDERS was established pursuant to Corporations Code sections 25532 and 25401 in that respondent offered and sold a security by means of written or oral communications which included an untrue statement of a material fact and omitted a material fact.

4. Respondent's testimony displayed a lack of comprehension of statutes and regulations relevant to the activities in which she engaged. She violated statutory provisions by obtaining client funds in exchange for a sham promissory note, and used all of the proceeds for her personal benefit. The promissory note was a security not qualified with the Department of Corporations. Respondent was not certificated as a broker-dealer who could conduct such a transaction and the note was offered and sold by means of written and oral communications which included untrue statements of fact and material omissions.

When her improprieties became the subject of an investigation by the San Joaquin County Sheriff's Office respondent engaged in multiple misrepresentations in an effort to mislead deputies and conceal her activities. She then diverted trust funds to repay Mr. Hartgraves, apparently in the hope of halting the criminal investigation.

In addition to her lack of knowledge, respondent's testimony displayed a refusal to conform her conduct to the requirements of the Corporations Code. In the circumstances, the DESIST AND REFRAIN ORDERS are essential to protect the public interest.

ORDER

The DESIST AND REFRAIN ORDERS issued by the Department of Corporations against respondent Naullie Elizabeth Gynes ARE AFFIRMED.

Respondent's appeal IS DENIED.

Dated: November 29, 2001

M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings