BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the DESIST and REFRAIN ORDER Issued to:	File No.: 7778
JEAN-CLAUDE SOLEIL,	OAH No. N2006110225
Respondent.	

DECISION

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

This Decision shall become effective on March 14, 2007.

IT IS SO ORDERED this 13th day of March 2007.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order Issued to: JEAN-CLAUDE SOLEIL, Respondent.	Case No. 7778 OAH No. N2006110225

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on November 27, 2006.

Douglas M. Gooding, Senior Corporations Counsel, represented Preston DuFauchard, California Corporations Commissioner.

Respondent Jean-Claude Soleil represented himself.

The matter was initially submitted on November 27, 2006. The record was reopened on November 29, 2006, when complainant submitted a Request for Official Notice and a memorandum of points and authorities in support of the request, asking that notice be taken of a 2002 Desist and Refrain Order issued to Tibor Krechko; these documents were marked collectively as Exhibit H. Complainant filed a written response, which was received on December 12, 2006, and marked Exhibit 4. (Complainant also submitted a fax copy of his response on December 11, 2006.) Notice is taken of the factual matters set forth in Exhibit H. The record was closed and the matter was deemed submitted on December 12, 2006.

FACTUAL FINDINGS

1. On October 2, 2006, Preston DuFauchard, California Corporations Commissioner, issued a Desist and Refrain Order to respondent Jean-Claude Soleil. The Order alleges, in part, that respondent offered securities "in the form of memberships in an investment group," and that the securities were not qualified and not exempt. On November 11, 2006, respondent wrote to the Department of Corporations and stated that

he was looking for active investors to form an investment club, not offering securities. Respondent requested a hearing.

2. At some time prior to October 2, 2006, respondent distributed written materials by hand to about 50 homes in Windsor, California. Respondent did not know the residents of the homes; he picked the area because it is a well-to-do neighborhood. The written materials were inside an envelope addressed to "THE BEST HOMES IN AREA – A Great Offer Hard To Refuse," and bearing the return address of "Nicholas Turner." Inside the envelope was a letter on a bright yellow sheet of paper, signed by respondent and addressed to "Dear Potential Investor/Partner." The letter states, in pertinent part, as follows:

> I have received the enclosed offer and decided to look into this matter. I am a business owner in my 50-s and I have been in the wine industry for decades. . . . I have followed the lead and have met twice with the trading group leader who has explained me [sic] the details of their trading system and procedures. **It is impressive**, especially their loss-prevention procedures (only 4.2 cents average loss on loosing [sic] stocks. It seems to me, they would be able to produce significant profits daily even with 50% successful pick ratio, far below their usual 74%.
>
> I have also check out the leader's credentials and now I am convinced, he knows what he is talking about. . . .
>
> I would like to join his group and I am still looking for cash investors to form the needed pool of trading capital. If you are interested in talking about this venture, please contact me and we could meet, or meet with the group leader, too. [Original emphasis.]

The "enclosed offer" consists of a three-page letter from "Nick Turner." Turner's letter states, in pertinent part:

> My name is Nick Turner and I am looking for investors who might be interested in combining their assets/capital with what I have, in order to enter lucrative trend and swing stock trading activities. Then, upon having formed the required amount of cash capital, we may join the group of professional traders I know, open and activate a separate online stock trading account with Trade Station Securities, Inc., an online trade brokerage, and then trade with the group using their office, expertise, and trading system. . . .

[¶] . . . [¶]

. . . The Group uses powerful computers with multiple large monitors attached to each of the PCs, which are connected through DSL to TradeStation 8 (TS8) trading platform and to the Group's trading accounts. The Group utilizes their own software (developed, designed, and tested in house over the years) which allows them to sharply pinpoint the stock that develops a powerful price-movement trend among all observed stock issues. Associates are watching 24 complex charts, all for different stocks, projected on each of 8-10 large monitors. They have incorporated onto those charts some half a dozen powerful indicators out of 1008 available on the TS8 trading platform. Position-entry decision-making is supported by two basic approaches providing lead and data in **real time**:
a/ the first approach pinpoints the departure point, the direction, and the strength of the developing price trend of a stock which is promptly observed from among over 300 observed stocks;
b/ the second approach emphasizes the trend support by trade volume indicators for specific [sic], also each of 24 observed issues on every screen, and for all 33+ stocks on all screens constantly during the trading session.

Using macros and hot-keys on keyboards, traders (also called "fishers") may switch from one observational angle to another (a/ to b/), and from one set of 72 stocks (24 stocks on 3 monitors observed at a given moment by each associate called "fisher") to another set of 72 charts at any time. . . .

Trading process: "Fishers" are constantly watching the action on their 3 monitors, following the trend development of 144 issues that each of them handles, listening to news and market analysis, then providing the investment leads and calling the "buy" order for an issue they choose. The **group leader** makes the final "go" entry decision.

[¶] . . . [¶]

I am working on pooling together a few active and less active investors in order to invest and start trading with the Group. [Original emphasis.]

The "group leader" respondent and Turner referred to is Tibor Krechko.

3. Krechko has been researching swing/trend stock trading since 1998. He developed the trading program that respondent and Turner described in their letters. While Krechko has not copyrighted his system, he testified that the system is his property and he objected to public disclosure of any pictures showing his system in use. Krechko's system is complex. He uses three large computer monitors with 25 charts displayed on each monitor; each chart shows the price activity of 25 different stocks. Krechko testified that there are over 1,000 indicators of price movement and, after three years of research, he has identified the best ones. On each chart he can plot different indicators in "real time" and predict movement in the price of the stock. He has developed computer "hot-keys" that allow him to toggle quickly from one indicator to another. Krechko maintains that his indicators have an accuracy rate between 70 and 90 percent. Krechko testified that he trades in over 300 stocks, and he cannot watch the entire market himself. He needs other persons, trained in his system, to watch the monitors and assist him. Krechko believes that a 100 percent annual return to investors using his system would be a conservative estimate.

Krechko holds two master's degrees in business administration, one with an emphasis in management and the other with an emphasis in accounting and finance, from American InterContinental University. He has completed the course work to obtain his Ph.D. in business administration from Kennedy Western University. At this time, Krechko is a full-time student at Santa Rosa Junior College.

Krechko and respondent met at a class they were both taking to develop their resumés. Krechko described his trading system to respondent, and respondent was interested. They decided to form an "investment partnership," and respondent then distributed the "invitation" to Windsor residents asking them to join the "partnership." Krechko felt that they were forming an investment club, which he believes is permitted under federal securities law. No club or partnership was ever formed, however, because Krechko and respondent needed a minimum of $30,000 to engage in swing/trend trading and they did not have that amount of money between them, and no one responded to their invitation.

4. Krechko was the subject of a Desist and Refrain Order issued by the commissioner on May 6, 2002. The 2002 Order was not contested. The Order recites that Krechko had circulated a three-page letter to residents of Oakmont Village, a retirement community in Santa Rosa. At that time, Krechko was doing business under the name "Sonoma Trade Exchange." In his letter, Krechko stated that "[o]ur company specializes in international trade, barter and – stocks DAYTRADING. We have spent over 5 years of research and practice to master the new way of stocks trading and we are now offering our trading skills to any potential partner who might be interested in short-term investment with us." [Original emphasis.] Krechko went on to state that he was seeking "silent or active" partners to invest a minimum of $25,000 in day trading accounts.

5. Respondent was "totally surprised" to receive the Desist and Refrain Order. Except for a brief period when he invested in commodities in the early 1990's, respondent

has no experience in investments or stock trading. He has never held any licenses to sell securities. He has held executive and administrative positions in the past but, at the present time, respondent is employed as a long-haul driver for FedEx. Respondent never intended to offer a security, and he feels that he never did: he thought Krechko had developed a very good system, and his letter to Windsor residents was an attempt to find others to use the system. Respondent emphasizes that he never received any responses to his letter, and he never pursued any further contacts with the persons to whom he distributed the letter. No investment group was ever formed. At the time he distributed the letter, respondent was unaware of the prior Desist and Refrain Order issued to Krechko.

Respondent was prepared to invest $10,000 in swing/trend trading if additional investors could be found. Krechko assured him that he and the other investors would be trained in the use of Krechko's system before they started trading with money.

Respondent is currently seeking executive-level jobs and he feels that the Desist and Refrain Order, which is posted on the Internet, has hurt his ability to find appropriate employment.

6. Between January 1, 2000 and November 14, 2006, respondent did not file with the Department of Corporations a request to qualify the offer and sale of securities.

LEGAL CONCLUSIONS

1. It is unlawful for any person to offer or sell in this state any security in an issuer transaction unless such sale has been qualified or unless the transaction is exempt. (Corp. Code, § 25110.) The term "offer" includes "every attempt or offer to dispose of, or solicitation of an offer to buy" a security. (Corp. Code, § 25017, subd. (b).) It is undisputed that respondent has never sought to qualify any securities for sale in California. Respondent does not claim his offer to Windsor residents is exempt.[1]

2. Respondent's letter to Windsor residents was an "offer" within the meaning of Corporations Code section 25110: the issue is whether respondent was offering to sell a security. The commissioner contends that respondent was offering "securities in the form of an investment group. The purported purpose of the group is to pool its resources to engage in stock trading, to be managed by persons other than the investors." Respondent contends that he was offering an opportunity to participate in an investment club.

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[1] The only exemption that might apply is the "private offering" exemption set forth in Corporations Code section 25102, subdivision (f). The purpose of that exemption, however, is to allow the sale of securities to a limited number of persons with whom the offeror has a preexisting personal or business relationship, or who have demonstrated to the offeror that they have the business or financial experience to protect their interests in the transaction. Under the private offering exemption, a security cannot be offered by "publication of any advertisement." Since respondent distributed his letter to residents of Windsor whom he did not know, the private offering exemption would not protect him even if he asserted it.

California defines the term "security" broadly. It 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; . . . or, in general, any interest or instrument commonly known as a 'security' . . . ." (Corp. Code, § 25019.) The purpose of such a broad definition is "to protect the public against spurious schemes, however ingeniously devised, to attract risk capital." (*Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 814.) The particular label or name given to a venture – whether it calls itself a club, a membership, or a trading group – does not determine whether it involves the sale of securities. The critical issues are whether the venture "'involves an attempt by an issuer to raise funds for a business venture or enterprise; an indiscriminate offering to the public at large where the persons solicited are selected at random; a passive position on the part of the investor; and the conduct of the enterprise by the issuer with other people's money.'" (*Id.* at p. 815, quoting with approval from Dahlquist, Regulation and Civil Liability Under the California Securities Act, 33 Cal. L. Rev. 343, 360.)

Respondent argues, in essence, that the participants in his club would not be passive, but would actively participate in swing/trend trading. Respondent's argument is not persuasive, for two reasons. First, the evidence does not support it. Respondent's letter states that he is looking for a "pool" of trading capital. Turner's letter echoes that purpose, as he states that he is "working on pooling together a few active and *less active* investors in order to invest and start trading with the Group." [Italics added.] Second, to avoid characterization of the investment as a security, investors must be involved in "those essential managerial efforts which affect the failure or success of the enterprise." (*People v. Graham* (1985) 163 Cal.App.3d 1159, 1168.) The evidence establishes that, in this case, those essential managerial efforts would be provided by Krechko. The highly complex and sophisticated trading venture depends on Krechko's expertise and the software system he developed and owns. Krechko would be the group leader and would make the final investment decisions. While investors might provide some assistance to Krechko, it is plain that the essential managerial efforts that would determine the success or failure of the venture would come from Krechko, not local residents chosen at random.

It is recognized that respondent did not realize that his actions might constitute an offer to sell securities, but respondent's state of mind is not a defense to issuance of a Desist and Refrain Order.

3. Cause exists for the issuance of the commissioner's Desist and Refrain Order. The interests in the proposed swing/trend trading venture are securities. The securities were offered for sale in California without being qualified, and they are not exempt.

ORDER

The Desist and Refrain Order issued to respondent Jean-Claude Soleil on October 2, 2006, is affirmed.

DATED: December 22, 2006

DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings