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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ORANGE

11 THE PEOPLE OF THE STATE OF
CALIFORNIA, by and through the
12 CALIFORNIA COMMISSIONER
CORPORATIONS,
13 Plaintiff,
14 vs.
15 STEVEN ARTHUR SCOTT, an individual, and
16 doing business as BENCHMARK FINANCIAL
SERVICES,
17 Defendants.

Case No.: 06CC07158
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPPORT OF NOTICE
OF EX PARTE APPLICATION AND
APPLICATION FOR TEMPORARY
RESTRAINING ORDER; AND REQUEST
FOR ORDER TO SHOW CAUSE RE:
PRELIMINARY INJUNCTION
Judge: JUDGE GAIL A. ANDLER
Dept: DEPT. C4
Hearing Date:
Hearing Time:
Date Action Filed:
Trial Date:

State of California - Department of Corporations

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27		
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MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF APPLICATION FOR:

TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ENJOINING DEFENDANTS FROM:

(A) VIOLATING CALIFORNIA CORPORATIONS CODE SECTION 25230, BY CONDUCTING BUSINESS AS AN INVESTMENT ADVISER WITHOUT FIRST SECURING A CERTIFICATE FROM THE CALIFORNIA CORPORATIONS COMMISSIONER, OR SUBSTANTIALLY ASSISTING THE VIOLATIONS THEREOF IN THE STATE OF CALIFORNIA;

(B) VIOLATING CALIFORNIA CORPORATIONS CODE SECTION 25235, BY ENGAGING IN FRAUDULENT, DECEPTIVE, OR MANIPULATIVE PRACTICES, INCLUDING BUT NOT LIMITED TO, DISTRIBUTING ADVERTISEMENTS CONTAINING CLIENT TESTIMONIALS, WITHIN THE MEANING OF CALIFORNIA CODE OF REGULATIONS, TITLE 10, SECTION 260.235 SUBDIVISION (a)(1);

(C) VIOLATING CALIFORNIA CORPORATIONS CODE SECTION 25235, BY ENGAGING IN FRAUDULENT, DECEPTIVE, OR MANIPULATIVE PRACTICES, INCLUDING BUT NOT LIMITED TO, DISTRIBUTING ADVERTISEMENTS CONTAINING MISPRESENTATIONS OF MATERIAL FACT, WITHIN THE MEANING OF CALIFORNIA CODE OF REGULATIONS, TITLE 10, SECTION 260.235 SUBDIVISION (a)(5); AND

(D) VIOLATING CALIFORNIA CORPORATIONS CODE SECTION 25235, BY ENGAGING IN FRAUDULENT, DECEPTIVE, OR MANIPULATIVE PRACTICES, INCLUDING BUT NOT LIMITED TO, FAILING TO DISCLOSE A SELF-REGULATORY ORGANIZATION'S DISCIPLINARY PROCEEDING, WITHIN THE MEANING OF CALIFORNIA CODE OF REGULATIONS, TITLE 10, SECTION 260.235.4 SUBDIVISION (a)(3).

I. INTRODUCTION

One of the many ways that the California Department of Corporations ("Department") protects the California investing public is through the licensing of investment advisers pursuant to the

1 California Securities Law of 1968 ("CSL") (California Corporations Code section 25000, et seq.).
2 This is a very important duty, since an incompetent or unscrupulous investment adviser can easily
3 make recommendations or take actions that can destroy their clients' financial portfolios, with
4 devastating consequences for clients and their families.

5 Steven Arthur Scott, an individual ("SCOTT"), and doing business as Benchmark Financial
6 Services ("BENCHMARK FINANCIAL SERVICES" or "DEFENDANTS") have been and continue
7 to conduct business as an investment adviser without first obtaining the required certificate, or
8 license, from the Commissioner.

9 Further, DEFENDANTS have engaged and continue to engage in fraudulent, deceptive, or
10 manipulative practices, within the meaning of CSL, by distributing advertisements containing client
11 testimonials and misrepresentations of material fact, and failing to disclose SCOTT's disciplinary
12 history to clients.

13 The People of the State of California, by and through the California Corporations
14 Commissioner ("Commissioner"), seek an ex parte Order, with due notice to DEFENDANTS, issuing
15 a Temporary Restraining Order and request for an Order to Show Cause Re: Preliminary Injunction
16 to prevent ongoing and continuing violations of the California Securities Law of 1968.

17 II. STATEMENT OF FACTS

18 On or about December 12, 1993, SCOTT registered with the Department as a securities
19 broker-dealer agent (CRD # 1174431). From that time, until 1999, Scott was employed by various
20 securities broker-dealer firms.

21 On or about May 19, 1995, the National Association of Securities Dealers, Inc. ("NASD"), a
22 self-regulatory organization authorized by Congress to regulate the activities of securities broker-
23 dealers, censured and fined SCOTT \$2,500.00 for violations of Article III, section 1 and 43 of the
24 NASD Rules of Fair Practice. SCOTT signed a Letter of Acceptance, Waiver and Consent stating,
25 "Scott received compensation ... from public customers ... in connection with his participation in
26 outside business activities in that he provided financial planning and advisory services to these
27 customers for a fee." Further, the Letter of Acceptance, Waiver and Consent stated that "[t]hese
28 activities were outside the scope of Scott's relationship with his employer firm." Declaration of Jon

1 Wroten (“*Wroten Decl.*”) p. 2: 9-12 and Exhibit 1, specifically pages DOC00003-DOC00004, filed
2 concurrently herewith and incorporated herein.

3 On or about April 22, 1999, SCOTT was terminated by his employer firm, located in
4 Southern California, based on that company’s determination that “Scott borrowed money from 13
5 clients and charged investment advisory fees to 13 clients without proper qualification.” *Wroten*
6 *Decl.*, p. 2: 15-17 and Exhibit 2, specifically page DOC00009. Thereafter SCOTT has not been
7 registered with the Department as a securities broker-dealer agent.

8 On or about September 27, 1999, approximately five months after being terminated, SCOTT
9 applied for an Orange County Fictitious Business License for a business named “BENCHMARK
10 FINANCIAL SERVICES” to be located at 3151 Airway Avenue, #P2B, Costa Mesa, CA 92626.
11 Since that time BENCHMARK FINANCIAL SERVICES’ physical office address has moved to
12 3151 Airway Avenue, #E-2, Costa Mesa, CA 92626. *Wroten Decl.*, Exhibits 4 and 5.

13 On or about December 7, 2000, the NASD fined SCOTT \$15,000.00 and suspended him from
14 associating with any NASD member for two years, for violations of NASD Rules 2110, 3030 and
15 3040. *Wroten Decl.*, Exhibit 3, specifically page DOC00015. SCOTT signed a Letter of Acceptance,
16 Waiver and Consent stating that during April 1995 through May 1998, “Scott sold securities in the
17 form of promissory notes to 13 public customers,” raising approximately \$160,000.00. “Scott told
18 investors that their funds would be used to finance his company called Master Market Forum
19 (‘MMF’). MMF was a developmental stage company through which Scott intended to conduct
20 financial planning seminars and produce video tapes.” “With respect to three of the customers ...
21 Scott charged them \$500 annually in exchange for various financial planning services.” *Wroten*
22 *Decl.*, p. 2: 22-23. Further, the Letter of Acceptance, Waiver and Consent indicates that SCOTT
23 engaged in these activities without first receiving permission from his employer firm. *Wroten Decl.*,
24 Exhibit 3, specifically page DOC00015.

25 On or about December 29, 2005 and in the course of the Department’s investigation, a
26 Subpoena Duces Tecum was served on BENCHMARK FINANCIAL SERVICES and SCOTT
27 requesting nine categories of records deemed material to the investigation of possible violations of
28 the laws under the Commissioner’s jurisdiction. *Wroten Decl.*, Exhibit 6. Over a period of

1 approximately four months the Department agreed to extend the subpoena production date five
2 separate times to accommodate SCOTT. On March 9, 2006 and in the course of the Department's
3 investigation, Corporations Examiner Jon Wroten interviewed SCOTT over the telephone regarding
4 the services provided by BENCHMARK FINANCIAL SERVICES. During this interview SCOTT
5 made several admissions regarding the services he provides and fees he charges. *Wroten Decl.*, pp. 3:
6 21-27 and 4: 1-21.

7 The Department's investigation revealed that BENCHMARK FINANCIAL SERVICES
8 provides services including asset management, investment management and portfolio analysis and
9 evaluation. *Wroten Decl.*, pp. 3: 24-27 and 5: 7-10. Further, BENCHMARK FINANCIAL
10 SERVICES researches, "picks" and recommends mutual funds for clients to invest in. *Wroten Decl.*,
11 p. 4: 1-2.

12 BENCHMARK FINANCIAL SERVICES, receives compensation for the investment
13 advisory services it provides to California residents. BENCHMARK FINANCIAL SERVICES
14 charges a fee, which can reach up to \$2,000.00 per client, for developing and drafting financial plans.
15 *Wroten Decl.*, p. 4: 13-14. Further, for BENCHMARK FINANCIAL SERVICES' mutual fund
16 research and recommendations clients are charged a 1% annually fee based on the balance held in
17 clients' mutual fund accounts. The fee is charged in semi annual increments on December 31 and
18 June 30, which is billed to clients in January and July, respectively. *Wroten Decl.*, p. 4: 7-10.

19 SCOTT estimated that he has about 40 clients with approximately \$15,000,000.00, in total,
20 invested in mutual funds. Thus BENCHMARK FINANCIAL SERVICES received approximately
21 \$150,000.00, in commissions, annually as a result of the 1% fee charged to clients for the mutual
22 fund research and recommendations. *Wroten Decl.*, p. 4: 7-12.

23 In order to attract new clients, BENCHMARK FINANCIAL SERVICES hosts monthly
24 seminars that are geared toward senior citizens. *Wroten Decl.*, p. 4: 15-18 and Exhibit 13. Attendees
25 commonly receive a free meal at the seminar. Solicitation materials provided to seminar attendees
26 identify SCOTT as "founder of BENCHMARK FINANCIAL SERVICES ... an independent
27 financial planner and Registered Investment Advisor." *Wroten Decl.*, Exhibit 7, specifically page
28 DOC00041. "As a personal financial and investment advisor since 1983, [SCOTT] regularly assists

1 pre and post-retirees in preserving their capital, increasing their income, protecting their assets and
2 more profitably organizing their investments.” *Wroten Decl.*, Exhibit 7, specifically pages
3 DOC00026 and DOC00038. Other solicitation materials contain client testimonials, such as “Steven
4 [Scott] goes beyond normal financial advisors;” “He gives us options and explains why you should
5 take one method over another;” and “Enclosed is payment to you for initiating my financial plan. I’m
6 very excited about the change I’m making.” *Wroten Decl.*, Exhibit 8.

7 Scott knowingly has conducted business as an unlicensed investment adviser. Scott admitted
8 that he has been “out of compliance” with the CSL for the past two years.¹ *Wroten Decl.*, p. 4: 19-21.

9 California Corporations Code section 25230 provides that it is unlawful to conduct business
10 as an investment adviser in this state without having first applied for and secured a certificate from
11 the California Corporations Commissioner, or unless exempt. SCOTT and BENCHMARK
12 FINANCIAL SERVICES have neither held a valid investment adviser certificate issued by the
13 California Corporations Commissioner nor have Defendants been an investment adviser registered
14 with the Securities and Exchange Commission (“SEC”). *Wroten Decl.* Exhibits 14 and 15,
15 respectively. Further, SCOTT and BENCHMARK FINANCIAL SERVICES are not exempt from
16 the certification requirement of California Corporations Code section 25230.

17 California Corporations Code section 25235 subdivision (d) provides that it is unlawful for
18 any investment adviser, directly or indirectly, to engage in any act, practice or course of business
19 which is fraudulent, deceptive, or manipulative. Sections of the California Code of Regulations
20 further define fraudulent, deceptive, or manipulative practices to include the distribution of
21 advertisements containing client testimonials and misrepresentations of material fact, and failure to
22 disclose a disciplinary history. SCOTT and BENCHMARK FINANCIAL SERVICES distribute
23 advertisements containing client testimonials and misrepresentations that SCOTT is a “financial
24 planner” and “Registered Investment Advisor.” *Wroten Decl.*, Exhibits 8 and 7, specifically pages
25 DOC00026 and DOC00038. Further, SCOTT failed to disclose to clients and potential clients that he

26 _____
27 ¹ When SCOTT was asked by Wroten to clarify his meaning of “out of compliance,” SCOTT explained that he is not
28 licensed to provide investment advice or registered as an investment adviser. *Wroten Decl.*, p. 4: 19-21.

1 was fined and suspended by the NASD.

2 **III. ARGUMENT**

3 **A. THE COMMISSIONER HAS THE AUTHORITY TO BRING THIS ACTION**
4 **FOR INJUNCTIVE AND ANCILLARY RELIEF**

5 Section 25530 of the California Corporations Code and Section 11180 of the California
6 Government Code provide the Commissioner with broad, discretionary authority to bring actions for
7 injunctive and other ancillary relief whenever it appears that any person has engaged or is about to
8 engage in any act or practice in violation of the California Securities Law of 1968 (“CSL”)
9 (California Corporations Code section 25000, *et seq.*).

10 Where an injunction is authorized by statute to protect the public interest, the usual equitable
11 considerations, such as inadequacy of legal remedy, irreparable harm, and balancing of interests are
12 irrelevant and it is not necessary to allege or prove them. (*Porter v. Fiske* (1946) 74 Cal.App.2d 332,
13 338.)

14 The California Supreme Court in *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72,
15 states the proper standard to be applied when a governmental entity seeks to enjoin alleged violations
16 of a statute as follows:

17 Where a governmental entity seeking to enjoin the alleged violation of an ordinance
18 which specifically provides for injunctive relief establishes that it is reasonably
19 probable it will prevail on the merits, a rebuttable presumption arises that the potential
harm to the public outweighs the potential harm to the defendant... (Emphasis added.)

20 The evidence presented in the declaration filed herewith clearly demonstrates a reasonable
21 probability that the Commissioner will prevail on the merits. The present action seeks to protect the
22 public by enjoining violations of the CSL. Here, Plaintiff has provided substantive evidence,
23 remarkably by reference to DEFENDANTS’ own solicitation materials and verbal admissions, that
24 DEFENDANTS are conducting business as an investment adviser in this state without first applying
25 for and securing from the Commissioner a certificate authorizing them to do so. The Court,
26 therefore, has ample authority to grant the temporary restraining order and ancillary relief prayed for.

27 ///

28 ///

1 **B. DEFENDANTS ARE CONDUCTING BUSINESS AS AN UNLICENSED**
2 **INVESTMENT ADVISER IN VIOLATION OF CORPORATIONS CODE**
3 **SECTION 25230**

4 Section 25230 of the California Corporations Code provides, in relevant part:

5 (a) It is unlawful for any investment adviser to conduct business as an investment
6 adviser in this state unless the investment adviser has first applied for and secured from
7 the commissioner a certificate, then in effect, authorizing the investment adviser to do
8 so 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.

9 Neither SCOTT nor BENCHMARK FINANCIAL SERVICES have ever possessed an
10 investment adviser certificate from the Commissioner as required by California Corporations Code
11 section 25230. *Written Decl.*, Exhibit 14.

12 **1. DEFENDANTS are investment advisers within the meaning of California**
13 **Corporations Code section 25009**

14 California Corporations Code section 25009 defines “investment adviser,” in relevant part, as:

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

19 (b) “Investment adviser” also includes any person who uses the title “financial planner”
20 and who, for compensation, engages in the business ... of advising others, either
21 directly or through publications or writings, as to the value of securities or as to the
 advisability of investing in, purchasing or selling securities

22 California Corporations Code section 25013 defines a person as: “ ... an individual, a
23 corporation, a partnership, a limited liability company, a joint venture, an association, a joint stock
24 company, a trust, an unincorporated organization, a government, or a political subdivision of a
25 government.”

26 The definition of “investment adviser” found in California Corporations Code section 25009
27 is similar to and patterned after the definition found in 15 U.S.C. section 80b-2(a)(11) of the Federal
28

1 Investment Advisers Act of 1940. (15 U.S.C. § 80b-1 et seq.; 1 Marsh & Volk, Practice Under the
 2 Cal. Securities Laws (Revised ed. 2001) § 13.01[1], p. 13-3; Cal. Dept. of Corporations, Release No.
 3 80-C (Revised) (May 25, 1993.) p. 2.)

4 15 U.S.C. section 80b-2(a)(11) provides, in relevant part:

5 “Investment adviser” means any person who, for compensation, engages in the
 6 business of advising others either directly or through publications or writings, as to the
 7 value of securities or as to the advisability of investing in, purchasing, or selling
 8 securities, or who, for compensation and part of a regular business, issues or
 9 promulgates analyses or reports concerning securities

10 Since section 25009 and the other investment adviser provisions of the California
 11 Corporations Code were closely patterned after the federal statutory language, the Court can rely in
 12 the instant action upon cases construing the Investment Advisers Act of 1940. (*Los Angeles*
 13 *Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen* (1960) 54 Cal. 2d 684, 688-689; *In*
 14 *re M.S.* (1995) 10 Cal. 4th 698, 713, revd. on other grounds (1985) 38 Cal. 3d 564.)

15 In 1987, the Securities and Exchange Commission (“SEC”) issued a lengthy interpretation of
 16 the key provisions of the Investment Advisers Act of 1940 (SEC, Investment Advisers Act Release
 17 No. IA-1092, 52 Fed. Reg. 38400 et seq. (Oct. 16, 1987) (hereinafter “SEC Release”). In 1993, the
 18 California Corporations Commissioner issued a release essentially applying the SEC Release to the
 19 investment adviser provision of the CSL (Cal. Dept. of Corporations, Release No. 80-C (Revised)
 20 (May 25, 1993) (hereinafter “Commissioner’s Release”). While not binding upon the court,
 21 regulatory agencies’ interpretations of laws under their jurisdiction are entitled to great weight.
 22 (*Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal. 4th 1, 7 and 14.) No
 23 reported California or Ninth Circuit cases have considered the positions staked out in the SEC
 24 Release or the Commissioner’s Release. However, the Eleventh Circuit in *United States v. Elliot*
 25 (11th Cir. 1995) 62 F. 3d 1304, 1309-1311, followed the SEC Release in holding that the defendants
 26 were investment advisers for the purposes of the Investment Advisers Act of 1940. Several federal
 27 and state courts have followed *Elliot*.

28 Applying the principles set forth in the SEC Release and Commissioner’s Release, as well as
 in *Elliot*, BENCHMARK FINANCIAL SERVICES is clearly an investment adviser within the

1 definition of California Corporations Code section 25009. DEFENDANTS: (a) provided investment
2 advice regarding securities to others; (b) is in the business of providing investment advice; and (c)
3 provided such investment advice for compensation. (SEC Release; *Elliot, supra*, 62 F. 3d 1304, 1309-
4 1310 [“A determination as to whether a person providing financial planning, pension consulting, or
5 other integrated advisory services is an investment adviser will depend upon” factors (a) – (c)
6 above].)

7 **a. DEFENDANTS provide investment advice to clients**

8 The Court in *Elliot* ruled that defendants in that case clearly provided investment advice to
9 their customers both by advising them to purchase Elliot Enterprise investments, such as tax-exempt
10 repurchase agreements, stock income agreements, or collateral loan agreements and by controlling
11 the investments underlying those investment vehicles. (*Id.* at p. 1310 [the court appears to indicate
12 that although “many investment advisers” advise their clients by maintaining control over what
13 purchases and sales are made with client funds, such control is not mandatory for a finding that
14 investment advice was provided].)

15 In this case, SCOTT admits to advising clients as to the value and desirability of investing in
16 certain securities. DEFENDANTS’ own solicitation materials and verbal admissions demonstrate
17 that BENCHMARK FINANCIAL SERVICES provides such services as asset management,
18 investment management, portfolio analysis and evaluation, and the development and drafting of
19 personalized financial plans. *Wroten Decl.*, pp. 3: 24-27 and 4: 13-14. Further, BENCHMARK
20 FINANCIAL SERVICES researches, “picks” and recommends mutual funds² for clients to invest in.
21 *Wroten Decl.*, p. 4: 1-2.

22 Clearly, these activities indicate that DEFENDANTS are providing investment advice to
23 others.

24 **b. DEFENDANTS are in the business of providing investment advice**

25 Whether a person will be considered to be “in the business” of providing investment advice
26

27 ² A mutual fund is an investment company that invests its shareholders’ money in a diversified selection of securities.
28 (Black’s Law Dict. (7th ed. 1999) p. 1040, col. 1.)

1 depends on all relevant facts and circumstances, and will be found if any one of the following are
2 true: (i) defendants held themselves out to the public as investment advisers or as providing
3 investment advice; (ii) defendants received compensation, representing a clearly definable charge, for
4 providing advice about securities; or (iii) defendants provided investment advice on more than rare
5 isolated occasions. (*Elliot, supra*, 62 F. 2d at p. 1310.)

6 **i. DEFENDANTS held themselves out as investment advisers**

7 In *Elliot*, defendant Elliot was registered with the SEC as an investment adviser. In letters
8 and brochures, defendants Melhorn and Elliot held Elliot out to the public as a registered investment
9 adviser. (*Ibid.*)

10 Similarly, DEFENDANTS in this case held SCOTT out to the public as a financial planner
11 and registered investment adviser. SCOTT admits to providing solicitation materials to potential
12 clients that identify SCOTT as “founder of BENCHMARK FINANCIAL SERVICES ... an
13 independent financial planner and Registered Investment Advisor.” *Wroten Decl.*, Exhibit 7,
14 specifically page DOC00041. Further, DEFENDANTS hold monthly seminars at which these
15 solicitation materials are distributed. *Wroten Decl.*, pp. 3: 13-15; 4: 15-16; Exhibit 6; and Exhibit 13.

16 There is no question that DEFENDANTS led the public to believe that they are financial
17 planners and registered investment advisers.

18 **ii. DEFENDANTS received compensation representing a**
19 **clearly definable charge for providing investment advice**

20 The Eleventh Circuit in *Elliot* ruled that defendants Elliot and Melhorn were compensated for
21 providing investment advice to their customers. (*Elliot, supra*, 62 F. 2d at p. 1311.) The Court’s
22 ruling was based on a definition of compensation for investment advice found in the SEC Release.
23 (*Ibid.*) The SEC Release stated that the “compensation element is satisfied by the receipt of any
24 economic benefit, whether in the form of an advisory fee or some other fee relating to the total
25 services rendered, commissions, or some combination of the foregoing.” (*Id.* at p. 1311, fn.8.) The
26 Court held that although defendants did not receive a separate investment adviser’s fee, they did
27 receive compensation for providing investment advice. (*Id.* at p. 1311.)

28 In this case, there is no doubt that DEFENDANTS were compensated for the investment

1 advisory services they rendered to clients. In exchange for developing and drafting a personalized
2 financial plan, DEFENDANTS charged a fee that can reach up to \$2,000.00 per client. *Wroten Decl.*,
3 p. 4: 13-14. For BENCHMARK FINANCIAL SERVICES' mutual fund research and
4 recommendations clients are charged a 1% annual fee based on the balance held in clients' mutual
5 fund accounts. *Wroten Decl.*, pp. 4: 7-12 and 5: 7-10. SCOTT admitted that the 1% fee results in an
6 estimated commission of \$150,000.00 annually. *Wroten Decl.*, p. 4: 4-8.

7 **iii. DEFENDANTS provided investment advice on more than**
8 **rare occasions**

9 The Eleventh Circuit in *Elliot* ruled that defendants in that case provided investment advice
10 on more than rare, isolated occasions: both defendants regularly gave advice regarding the safety and
11 appropriateness of specific investments offered through Elliot Enterprises. (*Elliot, supra*, 62 F. 3d at
12 pp. 1310 – 1311.)

13 DEFENDANTS' solicitation materials indicate that SCOTT has been a personal financial
14 planner since 1983. *Wroten Decl.*, Exhibit 7, specifically pages DOC00026 and DOC00038. SCOTT
15 admits that he has been "out of compliance" with the CSL for the past two years. *Wroten Decl.*, p. 4:
16 19-21. SCOTT admits that he hosts one seminar each month and adds new clients as a result of each
17 seminar. *Wroten Decl.*, p. 4: 15-18 and Exhibit 13. Further client lists provided by SCOTT indicate
18 that DEFENDANTS had 26 clients in January 2006 and 22 clients in March 2006 whom
19 DEFENDANTS are currently charging a 1% fee for mutual fund "picks." *Wroten Decl.*, pp. 4: 22-
20 27; 5: 1-2; Exhibit 10; and Exhibit 11.

21 This evidence filed herewith shows that DEFENDANTS have been and are providing
22 investment advice on more than rare, isolated occasions.

23 **c. DEFENDANTS are compensated for providing investment advice**

24 As discussed in section "b. ii." above, DEFEDNANTS are clearly compensated for the
25 services they render to investment adviser clients.

26 Based on the evidence presented, SCOTT, an individual, and doing business as
27 BENCHMARK FINANCIAL SERVICES are investment advisers within the meaning of California
28 Corporations Code section 25009. DEFENDANTS provide investment advice regarding securities to

1 others, engage in the business of providing investment advice and provide investment advice for
2 compensation. DEFENDANTS have violated California Corporations Code section 25230 by failing
3 to apply and obtain a certificate from the Commissioner authorizing them to conduct business as
4 investment advisers. DEFENDANTS have full knowledge that they are out of compliance with the
5 CSL and have continued to act as an investment adviser. Unless enjoined by this Court, SCOTT and
6 BENCHMARK FINANCIAL SERVICES will continue to ignore and violate California Corporations
7 Code section 25230.

8 **2. DEFENDANTS are not authorized to conduct business as investment**
9 **advisers**

10 The Commissioner has not issued a certificate to conduct business as an investment adviser to
11 SCOTT or BENCHMARK FINANCIAL SERVICES. A certificate of search attesting to the absence
12 of these records is attached as Exhibit 14 to *Wroten Decl.* DEFENDANTS are neither excluded from
13 the definition of investment adviser nor are their investment adviser activities exempt from the
14 certificate requirement of California Corporations Code section 25230. Therefore, DEFENDANTS
15 cannot meet their burden under section 25163 of proving that their investment adviser business was
16 exempt from the certification requirement of section 25230 of the CSL.

17 **C. DEFENDANTS ARE ENGAGED IN FRAUDULENT, DECEPTIVE, OR**
18 **MANIPULATIVE PRACTICES IN VIOLATION OF CORPORATIONS CODE**
19 **SECTION 25235**

20 Section 25235 subdivision (d) of the California Corporations Code provides that it is unlawful
21 for any investment adviser, directly or indirectly:

22 To engage in any act, practice, or course of business which is fraudulent, deceptive, or
23 manipulative. The commissioner shall, for the purpose of this subdivision, by rule define
24 and prescribe means reasonably designed to prevent such acts, practices, and courses of
25 business as are fraudulent, deceptive, or manipulative.

26 Sections of the California Code of Regulations, title 10, further define "fraudulent, deceptive,
27 or manipulative" practices to include the distribution of advertisements containing client testimonials
28 and misrepresentations of material fact, and failure to disclose a disciplinary history.

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1 In this case, DEFENDANTS have distributed solicitation materials containing
 2 misrepresentations, that SCOTT is a financial planner and registered investment adviser, to seminar
 3 attendees. As stated above, the Department's subpoena in relevant part requested copies of all
 4 documents distributed at the seminars hosted by BENCHMARK FINANCIAL SERVICES. *Wroten*
 5 *Decl.*, Exhibit 6. On February 10, 2006 in response to the Department's Subpoena, SCOTT produced
 6 documents identifying himself as "an independent financial planner and Registered Investment
 7 Advisor." *Wroten Decl.*, 3: 13-15 and Exhibit 7, specifically page DOC00041.

8 DEFENDANTS have never been registered with the Commissioner or the SEC to engage in
 9 the business activities of an investment adviser. *Wroten Decl.*, p. 5: 13-20. Further, DEFENDENTS'
 10 misrepresentation is untrue, false and misleading to potential clients.

11 Clearly, DEFENDANTS have engaged in fraudulent, deceptive, or manipulative acts, within
 12 the meaning of section 25235, by distributing advertisements containing the misrepresentation that
 13 SCOTT is a financial planner and registered investment adviser to seminar attendees.

14 **3. DEFENDANTS' failure to disclose a disciplinary history is a**
 15 **fraudulent, deceptive, or manipulative practice**

16 California Code of Regulations, title 10, section 260.235.4 in relevant part provides:

17 (a) It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of
 18 business within the meaning of Section 25235 of the Code for any investment adviser to
 fail to disclose to any client or prospective client all material facts with respect to:

19 ...

20 (2) A legal or disciplinary event that is material to an evaluation of the adviser's integrity
 or ability to meet contractual commitments to clients.

21 (b) It shall constitute a rebuttable presumption that the following legal or disciplinary
 22 event involved the adviser ... that were not resolved in the person's favor or subsequently
 reversed, suspended, or vacated are material within the meaning of subsection (a)(2) of
 this rule for a period of 10 years from the time of one or more of the following events:

23 ...

24 (3) Self-Regulatory Organization ("SRO")⁴ proceedings in which the person:

...

25 _____
 26 ⁴ "Self-Regulatory Organization" or "SRO" means those terms as defined in 17 C.F.R. 275.206(4)-4(d)(5). (Cal. Code
 27 Regs., tit. 10, § 260.235.4, subd. (d)(5).) The Code of Federal Regulations defines those terms to mean "any national
 28 securities or commodities exchange, registered association, or registered clearing agency." (17 C.F.R. § 275.206(4)-
 4(d)(5) (2006).)

1 (B) Was found to have been involved in a violation of the SRO's rules and was the
2 subject of an order by the SRO ... fining the person more than \$2,500; or ... otherwise
3 significantly limiting the person's investment-related activities.

4 In this case, DEFENDANTS have failed to disclose to clients and prospective clients that
5 SCOTT has been the subject of a SRO proceeding. On or about December 7, 2000, the NASD, an
6 SRO within the meaning of 17 C.F.R. 275.206(4)-4(d)(5), fined SCOTT \$15,000.00 and suspended
7 him from associating with any NASD member for two years. *Wroten Decl.*, p. 2: 20-23. As stated
8 above, the Department's subpoena in relevant part requested copies of all documents distributed at
9 the seminars hosted by BENCHMARK FINANCIAL SERVICES, as well as all client contracts and
10 other promotional materials used by DEFENDANTS. *Wroten Decl.*, Exhibit 6. Not a single
11 document produced, pursuant to the subpoena by SCOTT, mentions the 2000 NASD proceeding.
12 Further, this proceeding was not resolved in SCOTT's favor and took place within 10 years of
13 DEFENDANTS providing investment advisory services to client. *Wroten Decl.*, Exhibit 3,
14 specifically page DOC00015.

15 SCOTT and BENCHMARK FINANCIAL SERVICES have engaged in fraudulent, deceptive,
16 or manipulative practices by distributing advertisements containing client testimonials and
17 misrepresentations of material fact, and by failing to disclose that SCOTT was fined and suspended
18 by the NASD.

19 **IV. CONCLUSION**

20 The argument and supporting evidence filed with this Application demonstrate that the
21 DEFENDANTS have engaged in a blatant and ongoing pattern of violating California Corporation
22 Code sections 25230 and 25235. DEFENDANTS have full knowledge that they are in violation of
23 the CSL and have continued to act as an unlicensed investment adviser. Further, DEFENDANTS
24 will continue to engage in the fraudulent, deceptive, or manipulative practices discussed above.

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This Court has the power to grant the temporary restraining order and requested order to show cause re: preliminary injunction. Based on these points and authorities, the declaration and exhibits filed herewith, it is respectfully requested that the Court grant the requested injunctive relief to assist the Commissioner in protecting the public and preventing further harm to the public.

Dated: June 16, 2006

Respectfully submitted,

PRESTON DuFAUCHARD
California Corporations Commissioner

By: _____
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