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Arizona Corporation Commission

DOCKETED

MAR 26 2010

9 Attorneys for Respondents Christopher A. Jensen,
10 Julie Shayne Jensen, Rodolfo Preciado and Linda Preciado

DOCKETED BY

ARIZONA CORPORATIONS COMISSION

In the matter of:

DOCKET NO. S-20726A-10-0062

13 David E. Walsh and Lorene Walsh,
14 respondent and spouse, doing business as
15 New York Networks, Inc., a dissolved
16 Delaware corporation formerly known as
17 Jubilee Acquisition Corporation and as
18 Caliper Acquisition Corporation, the New
19 York Network, Inc., a revoked Nevada
20 Corporation, and the New York Networks,
21 Inc., an entity of unknown origin,

**ANSWER OF RESPONDENTS
CHRISTOPHER A. JENSEN, JULIE
SHAYNE JENSEN, RODOLFO
PRECIADO AND LINDA PRECIADO
TO NOTICE OF OPPORTUNITY FOR
HEARING REGARDING PROPOSED
ORDER TO CEASE AND DESIST, FOR
RESTITUTION, FOR
ADMINISTRATIVE PENALTIES AND
FOR OTHER AFFIRMATIVE ACTION**

19 Christopher A. Jensen and Julie Shayne
20 Jensen, respondent and spouse,

20 Rodolfo Preciado and Jane Doe Preciado
21 respondent and spouse,

21 Respondents.

24 Pursuant to A.A.C.R14-4-305, Respondents Christopher A. Jensen, Julie Shayne
25 Jensen, Rodolfo Preciado and Linda Preciado ("Respondents") hereby file this Answer
26 ("Answer") on behalf of themselves and no other respondents, in response to the Notice of
27 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, for Restitution,
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1 for Administrative Penalties and for Other Affirmative Action filed on February 19, 2010
2 in the above titled Matter (“Notice”). References to “paragraph” below are to the
3 corresponding paragraph in the Notice.

4 **I. JURISDICTION**

5 1. In answer to the allegations of paragraph 1, Respondents lack sufficient
6 information or knowledge to admit or deny and on that basis deny every allegation in that
7 paragraph.

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9 **II. RESPONDENTS**

10 2. In answer to the allegations of paragraph 2, Respondents lack sufficient
11 information or knowledge to admit or deny and on that basis deny every allegation in that
12 paragraph.

13 3. In answer to the allegations of paragraph 3, Respondents lack sufficient
14 information or knowledge to admit or deny and on that basis deny every allegation in that
15 paragraph.

16 4. In answer to the allegations of paragraph 4, Respondents lack sufficient
17 information or knowledge to admit or deny and on that basis deny every allegation in that
18 paragraph.

19 5. In answer to the allegations of paragraph 5, Respondents lack sufficient
20 information or knowledge to admit or deny and on that basis deny every allegation in that
21 paragraph.

22 6. In answer to the allegations of paragraph 6, Respondents lack sufficient
23 information or knowledge to admit or deny and on that basis deny every allegation in that
24 paragraph.

25 7. In answer to the allegations of paragraph 7, Respondents lack sufficient
26 information or knowledge to admit or deny and on that basis deny every allegation in that
27 paragraph.

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1 8. In answer to the allegations of paragraph 8, Respondents admit that
2 Christopher A. Jensen (“Jensen”) was at all times relevant a resident of California.
3 Goldstake Enterprises, Inc. is a Nevada corporation for which Jensen has served as
4 President. Respondents object to the phrase “sales representative for New York Networks,
5 Inc.” as vague and ambiguous and therefore Respondents lack sufficient information or
6 knowledge to admit or deny the allegations of paragraph 8 which include that phrase.
7 Respondents object to the term “investors” as used in paragraph 8 and in succeeding
8 paragraphs as vague and ambiguous and therefore Respondents lack sufficient information
9 or knowledge to admit or deny the allegations of paragraph 8 which include that phrase.
10 Respondents make reference to the alleged business card with respect to its terms. Except
11 as admitted herein, Respondents lack sufficient information or knowledge to admit or deny
12 and on that basis deny the other allegations in paragraph 8.

13 9. In answer to the allegations of paragraph 9, Respondents admit that Rudolfo
14 Preciado (“Preciado”) was at all times relevant a resident of California. Respondents admit
15 that Preciado has used “Rudy” as a shortened form of his first name, “Rodolfo,” but objects
16 to the pejorative implication that the use of “aka” in the Notice may be intended to suggest.
17 Respondents object to the term “sales representative for New York Networks, Inc” as
18 vague and ambiguous and therefore Respondents lack sufficient information or knowledge
19 to admit or deny the allegations of paragraph 9 which include that phrase. Except as
20 admitted herein, Respondents lack sufficient information or knowledge to admit or deny
21 and on that basis deny the other allegations in paragraph 9.

22 10. In answer to the allegations of paragraph 10, Respondents admit that Julie
23 Shayne Jensen was at all times relevant the spouse of Respondent Jensen. Respondents
24 admit that Preciado is married to Linda Preciado named herein as “Jane Doe Preciado.”
25 Except as herein admitted, Respondents lack sufficient information or knowledge to admit
26 or deny and on that basis deny the other allegations in paragraph 10.

27 11. In answer to the allegations of paragraph 11, Respondents deny the
28 allegations of this paragraph as to themselves. Respondent lack sufficient information or

1 knowledge to admit or deny the allegations of this paragraph as to Respondent David E.
2 Walsh (“Walsh”) and on that basis deny those allegations in paragraph 11.

3
4 **III. FACTS**

5 12. In answer to the allegations of paragraph 12, Respondents deny the
6 allegations of this paragraph as to themselves. Respondent lack sufficient information or
7 knowledge to admit or deny the allegations of this paragraph as to Respondent David E.
8 Walsh (“Walsh”) and on that basis deny those allegations in paragraph 12.

9 13. In answer to the allegations of paragraph 13, Respondents deny the
10 allegations in that paragraph.

11 14. In answer to the allegations of paragraph 14, Respondents deny the
12 allegations of this paragraph as to themselves. Respondent lack sufficient information or
13 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
14 on that basis deny those allegations in paragraph 14.

15 15. In answer to the allegations of paragraph 15, Respondents deny the
16 allegations of this paragraph as to themselves. Respondent lack sufficient information or
17 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
18 on that basis deny those allegations in paragraph 15.

19 16. In answer to the allegations of paragraph 16, Respondents lack sufficient
20 information or knowledge to admit or deny and on that basis deny every allegation in that
21 paragraph.

22 17. In answer to the allegations of paragraph 17, Respondents lack sufficient
23 information or knowledge to admit or deny and on that basis deny every allegation in that
24 paragraph.

25 18. In answer to the allegations of paragraph 18, Respondents lack sufficient
26 information or knowledge to admit or deny and on that basis deny every allegation in that
27 paragraph.

1 19. In answer to the allegations of paragraph 19, Respondents deny the
2 allegations of this paragraph as to themselves. Respondent lack sufficient information or
3 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
4 on that basis deny those allegations in paragraph 19.

5 20. In answer to the allegations of paragraph 20, Respondents deny the
6 allegations of this paragraph as to themselves. Respondents lack sufficient information or
7 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
8 on that basis deny those allegations in paragraph 20.

9 21. In answer to the allegations of paragraph 21, Respondents lack sufficient
10 information or knowledge to admit or deny and on that basis deny every allegation in that
11 paragraph.

12 22. In answer to the allegations of paragraph 22, Respondents deny the
13 allegations of this paragraph as to themselves. Respondents lack sufficient information or
14 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
15 on that basis deny those allegations in paragraph 22.

16 23. In answer to the allegations of paragraph 23, Respondents deny the
17 allegations of this paragraph as to themselves. Respondents lack sufficient information or
18 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
19 on that basis deny those allegations in paragraph 23.

20 24. In answer to the allegations of paragraph 24, Respondents deny the
21 allegations of this paragraph as to themselves. Respondents lack sufficient information or
22 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
23 on that basis deny those allegations in paragraph 24.

24 25. In answer to the allegations of paragraph 25, Respondents deny the
25 allegations of this paragraph as to themselves. Respondent lack sufficient information or
26 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
27 on that basis deny those allegations in paragraph 25.

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1 26. In answer to the allegations of paragraph 26, Respondents admit that during
2 2007 they participated in telephone calls in which the timing of the acquisition of
3 properties and a public offering were discussed. Respondent lack sufficient information or
4 knowledge to admit or deny the remaining allegations of paragraph 26 and on that basis
5 deny those allegations in paragraph 26.

6 27. In answer to the allegations of paragraph 27, Respondents lack sufficient
7 information or knowledge to admit or deny and on that basis deny every allegation in that
8 paragraph.

9 28. In answer to the allegations of paragraph 28, Respondents lack sufficient
10 information or knowledge to admit or deny and on that basis deny every allegation in that
11 paragraph.

12 29. In answer to the allegations of paragraph 29, Respondents deny the
13 allegations of this paragraph as to themselves. Respondents lack sufficient information or
14 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
15 on that basis deny those allegations in paragraph 29.

16 30. In answer to the allegations of paragraph 30, Respondents lack sufficient
17 information or knowledge to admit or deny and on that basis deny every allegation in that
18 paragraph.

19 31. In answer to the allegations of paragraph 31, Respondents lack sufficient
20 information or knowledge to admit or deny and on that basis deny every allegation in that
21 paragraph.

22 32. In answer to the allegations of paragraph 32, Respondents lack sufficient
23 information or knowledge to admit or deny and on that basis deny every allegation in that
24 paragraph.

25 33. In answer to the allegations of paragraph 33, Respondents lack sufficient
26 information or knowledge to admit or deny and on that basis deny every allegation in that
27 paragraph.

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1 **V. VIOLATION OF ARS § 44-1842**

2 41. In answer to the allegations of paragraph 41, Respondents deny the
3 allegations of this paragraph as to themselves. Respondent lack sufficient information or
4 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
5 on that basis deny those allegations in paragraph 41.

6 42. In answer to the allegations of paragraph 42, Respondents deny every
7 allegation in paragraph 42.

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9 **VI. VIOLATION OF A.R.S. § 44-1991**

10 43. In answer to the allegations of paragraph 43, Respondents deny the
11 allegations of this paragraph as to themselves. Respondent lack sufficient information or
12 knowledge to admit or deny the allegations of this paragraph as to Respondent Walsh and
13 on that basis deny those allegations in paragraph 43.

14 44. In answer to the allegations of paragraph 44, Respondents deny every
15 allegation of paragraph 44.

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17 **AFFIRMATIVE DEFENSES**

18 Upon information and belief, the Respondents assert the following affirmative
19 defenses:

20
21 **FIRST AFFIRMATIVE DEFENSE**
22 (Failure to State a Cause of Action)

23 45. Neither the Notice nor any cause of action alleged therein alleges facts
24 sufficient to state a cause of action.

25 **SECOND AFFIRMATIVE DEFENSE**
26 (Lack of Jurisdiction)

27 46. Respondents aver that Securities Division of the Arizona Corporation
28 Commission ("Commission") lacks jurisdiction as to investors outside of Arizona and as to

1 acts committed outside of the state. In a similar proceeding brought by the California
2 Commissioner of Corporations, the Proposed Decision of the Administrative Law Judge
3 dated January 4, 2010, a Desist and Refrain Order directed to Walsh was vacated in its
4 entirety and the Administrative Law Judge found, in part, "it was not established that
5 *anyone* made untrue statements of material fact." (A true and correct copy of that decision
6 is attached hereto as Exhibit A.)

7
8 **THIRD AFFIRMATIVE DEFENSE**
(Statute of Limitations)

9 47. Respondents aver that the Notice and each cause of action alleged therein is
10 barred by the applicable statutes of limitations, including, but not limited to, Arizona
11 Revised Statutes ("A.R.S.") Section, 44-2004,

12 **FOURTH AFFIRMATIVE DEFENSE**
13 (Laches)

14 48. The action and all relief sought by the Notice is barred by laches.

15 **FIFTH AFFIRMATIVE DEFENSE**
16 (Unclean Hands)

17 49. The action and all relief sought by the Notice is barred by unclean hands.

18 **SIXTH AFFIRMATIVE DEFENSE**
19 (Waiver)

20 50. The action and all relief sought by the Notice is barred by reason of waiver.

21 **SEVENTH AFFIRMATIVE DEFENSE**
22 (Estoppel)

23 51. The action and all relief sought by the Notice is barred by reason of waiver.

24 **EIGHTH AFFIRMATIVE DEFENSE**
25 (Good Faith – Compliance)

26 52. Respondents acted in conformity with, and in reliance on applicable, written
27 administrative regulations, orders, rulings, guidelines approval, and/or interpretation of
28 federal and state agencies, if any apply.

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NINTH AFFIRMATIVE DEFENSE
(Lack of Scierter)

53. Respondents lacked the requisite scierter to commit any and/or all of the acts alleged in the Notice.

TENTH AFFIRMATIVE DEFENSE
(First Amendment Free Speech)

54. To the extent that Arizona securities laws or regulations are allegedly applicable and have allegedly been violated, those laws, regulations and/or their purported application in this action and Notice violate Respondents' rights to free speech under the First Amendment to the United States Constitution.

ELEVENTH AFFIRMATIVE DEFENSE
(Exempt Transactions)

55. The alleged sales of alleged securities were exempt from registration requirements under applicable Arizona law, and thus Respondents have not violated A.R.S. Section, 44-1841.

TWELFTH AFFIRMATIVE DEFENSE
(Lack of Registration Requirement for "Dealer " or "
Salesmen")

56. Respondent Respondents aver that none of them was required to register as a "dealer" or "salesman" under applicable Arizona law, and thus Respondents have not violated A.R.S. Section, 44-1842.

THIRTEENTH AFFIRMATIVE DEFENSE
(Reservation to Assert Additional Affirmative Defenses)

57. Respondents presently have insufficient knowledge or information upon which to form a belief as to whether they may have additional, as yet unknown, affirmative

1 defenses. Respondents reserve the right to assert additional affirmative defenses in the
2 event discovery indicates it would be appropriate.

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Dated: March 24, 2010 LYNN & CAHILL LLP

By: Paul Winick by E. Gartenberg
Paul Winick

GARTENBERG GELFAND WASSON & SELDEN LLP

By: Edward Gartenberg
Edward Gartenberg
(Pro Hac Vice Application Pending)

Attorneys for Respondents Christopher A. Jensen,
Julie Shayne Jensen, Rodolfo Preciado and
Linda Preciado

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Exhibit A

Proposed Decision, dated January 4, 2010

The California Corporation Commissioner v. David E. Walsh

BEFORE THE
COMMISSIONER OF CORPORATIONS
STATE OF CALIFORNIA

THE CALIFORNIA CORPORATIONS
COMMISSIONER,

Complainant,

vs.

DAVID E. WALSH,

Respondent.

Case No. 9506

OAH No. 2009050795

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 15 and August 26, 2009, in San Diego, California.

Afsaneh Eghbaldari, Corporations Counsel, represented Preston DuFauchard, the California Corporations Commissioner.

Jon D. Cantor, Attorney at Law, represented respondent David E. Walsh, who was present throughout the hearing.

The matter was submitted on December 2, 2009.

FACTUAL FINDINGS

Jurisdictional Matters

1. On July 21, 2008, the Commissioner issued a desist and refrain order against respondent David E. Walsh and other parties.¹ Respondent subsequently requested a hearing. On May 26, 2009, the Commissioner served on respondent a notice of hearing.

¹ Of the five parties initially named in the order, the Commissioner stated at the hearing that two, Christopher A. Jensen and Rodolfo Preciado, were no longer respondents. In the Commissioner's post-hearing brief, David E. Walsh was the only respondent asserted to have violated the Corporations Code; it is inferred that the Commissioner therefore no longer seeks to take action against the remaining two respondents, New York Networks, Inc. and The New York Network, Inc. Thus, all references in this Proposed Decision to "respondent" are to David E. Walsh.

2. On July 15, 2009, the record was opened and jurisdictional documents were received. On July 15 and August 26, 2009, sworn testimony was given and documentary evidence was introduced. On November 16, 2009, the parties submitted post-hearing briefs in lieu of closing argument. On December 2, 2009, the record was closed and the matter submitted.²

The Issues

3. The desist and refrain order alleged that respondent engaged in the following conduct in violation of the California Corporations Code:

a. Offered and sold securities in the form of common stock and warrants, when such securities were neither qualified nor exempt from qualification, in violation of section 25110.³ The company whose securities were allegedly offered and sold was identified as "New York Networks, Inc."

b. Made the following untrue statements of material fact in connection with such offers and sales, in violation of section 25401: (i) The proceeds from the sale of the securities would be used to acquire Mad Engine, Inc., a California corporation; and (ii) New York Networks, Inc. would "go public" by November 2006, thereby increasing the value of the securities. It was further alleged that Mad Engine was not acquired and that New York Networks, Inc. did not "go public."

4. Based on the allegations of the desist and refrain order, the evidence presented at the hearing, and the arguments of the parties, respondent could have violated section 25110 on three distinct grounds: (i) That respondent himself offered or sold the securities in question; (ii) that respondent did so through Chris Jensen and Rodolfo Preciado acting as his agents; or (iii) that respondent did so by virtue of his ownership or control of the corporation as a controlling shareholder, director, or officer.

Based on the allegations of the desist and refrain order, the evidence presented at the hearing, and the arguments of the parties, respondent could have violated section 25401 on three distinct grounds: (i) That respondent himself made untrue statements of material fact; (ii) that respondent did so through Chris Jensen and Rodolfo Preciado acting as his agents; or (iii) that respondent did so by virtue of his ownership or control of the corporation as a controlling shareholder, director, or officer. An additional issue is whether, as to any statements legally attributable to respondent, such statements in fact constituted "untrue statements of material fact."

² Though respondent timely filed his post-hearing brief, the Office of Administrative Hearings had no record of his initial filing. Accordingly, on December 2, 2009, respondent refiled his brief at the request of OAH, the parties' briefs were received for non-evidentiary purposes as Exhibits Q and 28, and the record was deemed closed.

³ All statutory references are to the Corporations Code unless otherwise indicated.

Summary of Ultimate Findings

5. For the reasons stated below, it is found:

a. Respondent did not offer or sell securities in his individual capacity, through Jensen or Preciado acting as his agents, or by virtue of his ownership or control of the corporation. Specifically, it was not established that respondent's statements and conduct at investor sales presentations or elsewhere constituted the offer or sale of securities, that Jensen or Preciado were respondent's agents, or that respondent owned or controlled the corporation whose securities were issued.

b. Respondent did not make untrue statements of material fact in connection with the offer or sale of securities in his individual capacity, through Jensen or Preciado acting as his agents, or by virtue of his ownership or control of the corporation. More specifically, it was not established that respondent personally made any untrue statements of material fact at investor sales presentations or elsewhere. Further, as just noted, it was not established that Jensen or Preciado were respondent's agents or that respondent owned or controlled the corporation whose securities were issued.

The Entities

6. This proceeding involved three distinct corporations, all of whom bore the name New York Networks, Inc.⁴ One was a Nevada corporation. The other two were Delaware corporations. The two Delaware corporations were shell or shelf corporations, both purchased from a third party, attorney James Cassidy. When Cassidy owned those corporations, they were named Jubilee Acquisition Corporation and Caliper Acquisition Corporation. Each was renamed New York Networks, Inc. after the transfer from Cassidy. The three corporations will be referred to in this Proposed Decision as NYN-Nevada, NYN-Jubilee, and NYN-Caliper when specific reference to one of these three is intended. At other times, when it is not clear which corporation a witness or document was referring to, the corporation will be referred to simply as NYN.

Respondent, as part of an investment group consisting of about five other individuals,⁵ controlled NYN-Nevada.⁶ Respondent also controlled NYN-Jubilee.

⁴ The documentation and testimony proffered at the hearing variously referenced "New York Networks, Inc.," "The New York Network, Inc.," and "The New York Networks, Inc." Based on the entirety of the evidence, it appears that these variations were the result of inadvertent error or confusion as to both number (singular or plural) and definiteness (articulate or anarthrous), rather than reflective of actual distinctions between the several entities. It seems best to conclude that all three corporations were in fact named New York Networks, Inc. (i.e., anarthrous and plural). However, when documents are quoted in this Proposed Decision, the precise name used in the document will at times be used, even when that name varies from "New York Networks, Inc."

⁵ Though not relevant to the outcome of this matter, it is interesting to note that one of the investors was the late Ed McMahon, best known as the long-time announcer of the Tonight Show during the Johnny Carson years.

Respondent denied that he was a shareholder, director, or officer of NYN-Caliper. The Commissioner did not contest respondent's claim with regard to NYN-Caliper, but instead asserted that any distinction between the two NYN-Delaware entities was irrelevant, since respondent never distinguished between the two during the sales presentations of the company's stock.

7. Mad Engine, Inc. was a California corporation that designed and sold licensed T-shirts (i.e., shirts bearing logos of companies such as Disneyland, Marvel Comics and many others). Sadik Albert ("Albi") Amato was the president of Mad Engine. In addition to overseeing the operation of his company, Amato was involved in merchandising, design, and distribution of his products, and working with retailers and his sales force.

8. Wardley, Walsh, Wellesley (WWW) was a company providing business consulting and/or merchant banking services to businesses. Respondent was president of WWW.

Respondent testified that WWW was a consulting company, which provided planning services to businesses, including assistance to private businesses that sought to go public. Respondent denied that WWW itself "took companies public," or that WWW was an investment company. On at least one occasion, however, WWW executed a consulting agreement in which the company was referred to as "merchant bankers."⁷

The Corporate and Business Transactions

9. In 2004 or early 2005, respondent and his NYN-Nevada investment group decided to acquire a publicly-recorded corporation for the purpose of merging NYN-Nevada into the new corporation. The group purchased a shelf corporation⁸ from attorney James Cassidy called Jubilee Acquisition Corporation and changed the corporation's name to New York Networks, Inc. This entity was incorporated in Delaware.

10. In February 2005, Amato and respondent entered into a stock purchase agreement, pursuant to which respondent was to purchase the stock⁹ of Mad Engine for \$17.5

⁶ For example, the articles of incorporation, dated June 24, 2002, and subsequent documents filed with the Secretary of State and covering the period from 2003 to 2008, identified respondent as the incorporator and sole officer and director of the corporation.

⁷ The precise nature of the general business of WWW was not clear from the evidence presented at the hearing. However, what was relevant was WWW's actual and specific role with regard to the transactions and other matters involving NYN securities, not WWW's theoretical and general role as a business entity with regard to other transactions and matters.

⁸ Based on the evidence presented at the hearing, it is inferred that a "shelf" corporation is an entity that is formally incorporated but that does not own any assets or conduct any business. At some subsequent point in time, the corporation is sold, "ready made" so to speak, to a third party who can then activate the corporation as a going concern.

⁹ For reasons that are not clear, respondent characterized the agreement as involving a transfer of assets.

million in cash, and another \$17.5 million in NYN-Jubilee stock to be transferred to Amato. Amato signed the agreement as president of Mad Engine; respondent signed as chairman of "New York Network, Inc., a Delaware Corporation."

11. Pursuant to the February 2005 stock purchase agreement, Amato was to relinquish his managerial role in Mad Engine.¹⁰ However, that plan later changed, and Amato was instead to remain involved in management of the business. As a result, and in order to keep the transaction "clean," it was decided that a second shelf corporation ("yet another public vehicle") would be purchased from Cassidy. The company purchased was Caliper Acquisition Corporation. Since the New York Networks name appealed to Amato, that name was retained as the name of the new corporation. Like NYN-Jubilee, NYN-Caliper was incorporated in Delaware.¹¹ The February 2005 stock purchase agreement, which had involved NYN-Jubilee, was no longer to be utilized. Instead, the new company, NYN-Caliper, would acquire Mad Engine and NYN-Nevada through a purchase of assets. As a result of these planned acquisitions, respondent and the investment group would have owned a controlling interest in NYN-Caliper.

In order to bring about this result, \$35 million had to be raised to pay Amato and to take NYN-Caliper public. Investment banker MR Beal was retained to raise the necessary funds. However, before Beal would become actively involved, initial start-up costs of \$1,000,000 to \$1,500,000 had to be raised.

In the summer of 2006, Chris Jensen, who owned Gold Stake Enterprises, a public relations marketing firm, was brought into the picture. Jensen's role was to put on lunch and dinner presentations, during which presentations were to be made to potential investors by Amato for Mad Engine and/or NYN-Caliper and by the owners of two other companies, Tempest Microsystems and Bouldin Corporation. All potential investors had some pre-existing relationship with Jensen, his assistant Rodolfo Preciado, or someone else involved in the presentations.

12. In the meantime, in June 2006, "Mad Engine, Inc. and The New York Network, Inc., Inc.,"¹² and respondent/WWW signed a consulting agreement. Pursuant to that agreement, respondent and WWW were retained "to provide introductory services for

¹⁰ The main body of the agreement does not explicitly so state. The agreement references numerous "Exhibits," including "an employment agreement" and a "noncompetition agreement," which were not included with the copy of the agreement proffered at the hearing. Though more than one inference may be drawn from the reference to these two exhibits, respondent's uncontroverted testimony was that Amato was to relinquish his management of the company.

¹¹ NYN-Jubilee was dissolved so that the New York Networks name could be associated with another Delaware corporation.

¹² "Network" was in the singular. The word "Inc." appeared twice. The agreement stated that Mad Engine, Inc. and the New York Network, Inc. was a single corporation. No other evidence in the record suggested the existence of precisely such a corporation. The address given for this corporation was Mad Engine's address on Top Gun Drive in San Diego.

Mad Engine, Inc. and The New York Network, Inc. within their sphere of contacts and influence, as such introductory services may pertain to Mad Engine, Inc. and The New York Network, Inc.'s business plans, concepts and operational opportunities." Specifically, respondent/WWW agreed to "present and introduce" Mad Engine and NYN to public, private, and institutional investors, and others; to assist Mad Engine and NYN in the dissemination of communications and information as requested; to furnish to Mad Engine and NYN advice and recommendations with respect to these matters; and to make available to Mad Engine and NYN a shelf corporation which would be a fully reporting SEC corporation. The cost of the shelf corporation was to be \$350,000, to be paid to WWW. That amount was to include WWW's payments to counsel James Cassidy and MR Beal, "our professional partners." WWW was to receive as compensation 4.9% of Mad Engine and NYN common stock as well as a consultant's fee of ten percent of the purchase price of any shares sold to investors introduced to the company by WWW. Mad Engine and NYN were to pay the costs and expenses incurred by WWW.

Though the consulting agreement did not so specify, it is inferred, based on the timing of this agreement and the evidence as a whole, that NYN-Caliper was the corporation in question.

13. Sometime during the summer of 2006, NYN issued a 50-page confidential private placement memorandum. The document does not bear a CUSIP number;¹³ however, the evidence established that the entity in question was NYN-Caliper.¹⁴ The company's address was stated to be 6650 Top Gun Street, which was Mad Engine's address. The memorandum stated that the "sole purpose" of the NYN-Caliper was to acquire the assets of Mad Engine and NYN-Nevada. Further, NYN-Caliper "is a public reporting corporation that will apply to have its Common Stock traded on the NASDAQ . . . on the closing of the Asset Acquisition. Prior to the closing of both Asset Acquisitions, the Company has no significant assets or liabilities." The memorandum goes on to say, "This investment involves substantial risk and is only appropriate for sophisticated investors. There is no assurance that the Company will achieve any of its investment objectives. See 'RISK FACTORS.'" The "risk factors" were subsequently described in great detail. Further, for California residents, "The sale of the securities which are the subject of this offering has not been qualified with the Commissioner of Corporations . . . and is being made pursuant to the exemption from qualification under the National Securities Market Improvement Act of 1996 or, in the alternative pursuant to the exemption available in section 25102(1) of the California Corporations Code for private placements."

¹³ CUSIP is an acronym for a number assigned by Standard and Poor's to the securities of a public corporation. Each public corporation has a unique CUSIP number.

¹⁴ For example, a "Term Sheet" that described New York Networks, Inc. in terms virtually identical to the private placement memorandum bore the CUSIP number 64967C. An SEC Form 12b-25 filing dated April 2, 2007, identified New York Networks, Inc., formerly Caliper Acquisition Corporation, as bearing that same CUSIP number. Further, what appeared to be a revised version of the New York Networks, Inc. confidential private placement memorandum bore the same CUSIP number.

The memorandum stated that upon the close of asset acquisition, Amato would acquire 5,833,333 shares of the common stock of NYN-Caliper. Further, "The sale of Mr. Amato's stock will be achieved through the use of an investment banker, ML Beal & Company ('Beal'), which will first purchase on a best efforts basis 2,916,667 shares from Mr. Amato for a total of \$17,500,000. After this initial purchase of one half of Mr. Amato's Common Stock, Beal will then act as an agent for Mr. Amato in the sale of his remaining shares until Mr. Amato receives another \$17,500,000 in cash, after which Beal's agency agreement will terminate and the Company will have no further obligation to Mr. Amato with respect to the sale of his shares. The sale of Mr. Amato's remaining shares through Beal may occur in the open market pursuant to Rule 144. Until Mr. Amato receives the first \$17,500,000 from the sale of his shares, Mr. Amato will have a voting trust over the 42,795,000 shares of the Company's Common Stock owned by Wardley, Walsh & Wellesley. After Mr. Amato receives the first installment of \$17,500,000, the voting trust will terminate."

The memorandum identified Amato as the founder and Chairman of Mad Engine, and as the Chairman and President of NYN-Nevada since 2005.¹⁵ It stated that "he will become the [CEO] of [NYN-Caliper] after the Asset Acquisitions are completed. Mr. Amato will use his experience in the industry to follow through with his new responsibilities at the Company, and will continue to be responsible for the day-to-day operations of Mad Engine." Walsh was not listed as an officer or director of NYN-Caliper.

The memorandum stated that WW currently owned 42,795,000 shares of NYN-Nevada and would, after the asset acquisitions were accomplished, own the same number of shares (84.1%) of NYN-Caliper. The memorandum stated that Amato currently owned 10,000 shares in Mad Engine and would, after the asset acquisitions were accomplished, own 5,833,333 shares (11.5%) of NYN-Caliper.

14. At some point, asset exchange agreements were drafted which would have accomplished the purposes stated in the private placement memorandum by effectuating the transfer of the assets of Mad Engine and NYN-Nevada to NYN-Caliper in exchange for voting stock in NYN-Caliper. These three corporations were referred to as "Constituent Corporations." These draft agreements were never executed.

*Investors*¹⁶

15. In the fall of 2006, Christopher Evans attended a "fancy sit-down dinner" at a banquet hall where presentations were made by representatives of three companies seeking investors: Tempest Microsystems, Bouldin Corporation, and NYN. The representatives of

¹⁵ Amato's involvement in NYN-Nevada was not explained at the hearing.

¹⁶ In most instances, the investors did not identify New York Networks, Inc. specifically as NYN-Caliper, either via their testimony or in documents they wrote. However, it is clear from the entirety of the evidence (e.g., that they were given copies of the NYN-Caliper private placement memorandum) that this was the corporation in question.

the three companies spoke in highly positive terms about their respective companies. Amato spoke on behalf of NYN. Another individual, Chris Jensen, who was not directly affiliated with any of the three companies, also spoke in highly positive terms about all three. Respondent was present at the meeting and was introduced as the "banker" who "headed up all this" and was "going to take these companies public" onto the NASDAQ exchange. Jensen added that respondent was a "seasoned, veteran pro" who knew how to take companies public. Respondent spoke in highly positive terms about the three companies. At some point, it was stated that it was a "sure thing" that NYN would go public in November or December of that year. It was also stated that the value of the stock would increase greatly when this happened. Respondent compared NYN to Barney, stating that people who invested in Barney early on made "a ton" of money and that NYN had the potential to do the same. It seemed to Evans, that respondent and Jensen were working together, with respondent "handling the money part of it" and that Jensen, in fact, worked *for* respondent. Jensen was the main person who talked about the stocks. At one point, respondent stated that Jensen would answer questions, but that he, respondent, would "have to be out of the room," which respondent then did. At that point, statements, or further statements, were made about the security of the investments, when the company would go public, what steps had to be taken before it did so, and what the potential investment return would be. Evans and others at the dinner were given copies of the NYN-Caliper confidential private placement memorandum.

Several days later, Evans met with Jensen and Preciado,¹⁷ and invested \$45,000 in NYN-Caliper. Evans did not have a pre-existing relationship with either respondent or Jensen, but he knew Preciado, through the Mormon Church. Evans received common stock purchase warrants and common stock of NYN. The purchase warrant was dated November 1, 2006; the stock certificates were dated August 15 and August 31, 2006. These documents all bore respondent's signature. The stock certificates all bore the CUSIP number 64967 C, which was the CUSIP number for NYN-Caliper. The stock purchase warrants did not bear a CUSIP number; it is inferred that the warrants also related to NYN-Caliper.

Some time later, Evans participated in two conference calls involving numerous investors that respondent headed up. The calls were held in response to investor concerns.

Evans was never told that there were two different companies called New York Networks, Inc.

Evans never recovered any of his money; he lost the full \$45,000 investment.¹⁸

¹⁷ Preciado was also at the banquet hall meeting.

¹⁸ The facts set forth in this Finding are based primary on the testimony of Evans. Evans came across as attempting to testify as honestly and objectively as he could, but his memory as to exactly who said what was not strong and his testimony was often correspondingly vague. It seemed clear, however, that in Evans' view, Jensen, not Walsh, did most of the talking about NYN, but that Walsh was present during much of the period when Jensen was talking about the company.

16. In September 2006, Ryan Edwards attended a sales presentation at Fleming's restaurant in Phoenix, Arizona. Again, representatives from Tempest, Bouldin, and NYN spoke about these companies. Again, Amato was the NYN representative. Again, respondent was present. Respondent introduced Amato and spoke briefly about NYN and referenced the company's planned acquisition of Mad Engine. Jensen said the same thing. Jensen spoke about respondent, making him sound like an expert in helping companies go public. Respondent referred to investments in the three companies as a "phenomenal opportunity." Statements were made that there was relatively little or no risk, and that in a short time, the investment would or could double or more. Statements were made that the goal of investment in NYN was for the company to purchase Mad Engine and then go public and become listed on NASDAQ, and that the ideal time to sell the stock would be right when the company went public.¹⁹ Edwards also received a copy of the NYN-Caliper private placement memorandum at the meeting.

Edwards initially invested \$30,000 in Bouldin, was later able to get his money back, and (in January 2007) reinvested these funds in NYN-Caliper. At the time of his investment in NYN, Edwards spoke to Jensen, Preciado and others, but not to respondent. Edwards received common stock purchase warrants and common stock of NYN. These documents were all dated April 26, 2007, and all bore respondent's signature. The stock certificate bore the CUSIP number 64967 C (i.e., the number assigned to NYN-Caliper.) The stock purchase warrants did not bear a CUSIP number; it is inferred that the warrants also related to NYN-Caliper.

Edwards had never met respondent or Jensen before the meeting. He did, however, know a Ron Saxton, who first told Edwards about the NYN investment opportunity.

Edwards described himself as a having "a good working knowledge of investment," although he conceded he was not an expert.²⁰

Edwards was never told that there were two different companies called New York Networks, Inc.

¹⁹ Edwards repeatedly testified that Jensen and respondent made these various statements, without specifying which of the two made which specific statements. Edwards expressed substantial hostility against respondent during his (Edwards') testimony, and more than once seemed to be advocating rather than simply testifying. He thus did not come across as objective. His conclusory statements about what Jensen and respondent stated cannot be accepted at face value, and it cannot be determined which of the two made which specific statements. Since there were other communications after the initial meeting at Fleming's, it is also difficult to determine in some cases *when* certain statements were made.

²⁰ In contrast to Evans, when Edwards signed the investment document for NYN, he left blank the box opposite the statement that he was an "accredited" investor.

Edwards never recovered any of his money; he lost the full \$30,000 investment.²¹

17. In questionnaires filled out and submitted to the Commissioner, both Evans and Edwards stated that they were "solicited" to invest in NYN by Jensen; they did not mention respondent in this context. In these same questionnaires, neither Evans nor Edwards stated that they were told NYN would acquire Mad Engine and then go public.

18. Commissioner questionnaires filled out by three other individuals reflected that those individuals also invested in NYN based on representations published in the summer of 2006, that the company was going to go public toward the end of that year. These individuals stated that they were friends of Amato. They each stated they were solicited to invest by Jensen. None of these individuals identified respondent as being involved in the solicitation or sale.

19. Prior to September 8, 2006,²² Bob Bowen attended one of the presentations. Bowen had developed a business relationship with a Dean Essa, who had "grown up with Ron Saxton," whose ex-wife Julie "had remarried Chris Jensen," who "helped give the presentation with David Walsh." He recalled, "We were told we would be able to at least double our money when the stock went live around Thanksgiving. We were told this was the perfect time to go public, right before the Thanksgiving holiday. We needed to all act quickly for this to happen." He invested in all three companies. Bowen received a copy of the private placement memorandum. After looking it over, he later called respondent and asked him questions. Bowen recalled that respondent "was short with me, but I did bring up that I had looked at the companies on the internet and thought it was interesting to see him listed as the CEO of New York Networks. He stated it was because of experience he had with taking companies public."

Bowen participated in numerous conference calls in which certain promises and statements were made. "Sometimes it would be Chris, Rudy and David others it would be Rudy and Chris."²³

20. In August 2006, Diane P. Edwards (the mother of Ryan Edwards) learned about the NYN investment opportunity from her son. Diane did not attend any presentation, but did participate in conference calls when "Walsh and his Representatives told me and other potential investors that we could expect a high rate of return with no risk and a short turn around for these returns." According to Diane, "Walsh and his Representatives told us that NYN was going public on the NASDAQ by November 2006. I was assured that this

²¹ This Finding is based on Edwards' testimony. Though Edwards was not as credible as Evans, Edwards' testimony as to the matters set forth in this Finding were either not controverted by other evidence or were corroborated by Evans' similar testimony to the same effect.

²² Bowen did not state the date of the meeting; he did state, however, that he made his investment on September 8, 2006.

²³ This Finding is based on Bowen's letter to the Commissioner's counsel dated May 5, 2008.

was a done deal." Further, "Walsh and his Representatives told us that the proceeds from the sales would be used to acquire a company called Mad Engine and to develop, produce, and market branded entertainment." Further, "Walsh and his Representatives guaranteed that once NYN went public, the investors would receive a high rate of return. There was a sense of urgency to invest immediately because NYN was going public within six to eight weeks." Diane ultimately invested \$90,000 in NYN. Later, "Walsh and his Representatives" continued to make certain statements.²⁴

21. By April 2007, nearly all of the Bouldin and Tempest investors had "rolled over" their investments into NYN-Caliper. By that time, ML Beal had pulled out, and the parties were attempting to find another way to "make this transaction successful."

22. NYN-Caliper never purchased Mad Engine and never became publicly-traded on NASDAQ. The reasons why this did not happen are in dispute. The dispute essentially involves whether the fault lay with Amato on the one hand, or with Walsh on the other.²⁵ Regardless of whose fault it was, it seems clear that during the period when statements were made about NYN's intended acquisition of Mad Engine for the purpose of "going public," the parties still in fact intended to bring about this result.

23. The record is unclear as to where investors' funds ultimately went. Respondent testified that he received and held in escrow certain checks from investors (in the amount of about \$1.7 million) written to NYN-Caliper. Respondent testified that he paid out that money, under direction of NYN-Caliper officers, to third parties, such as Preciado, Cassidy and others, to pay their expenses. Amato testified at different times that checks were sent to Preciado and Jensen, to a trust account with Cassidy, and to a Nevada transfer agency.

Ownership and Control of NYN-Caliper

24. In a letter dated July 22, 2005, Amato stated, "After careful consideration I agree to assume the responsibilities of Chairman of the Board of the New York Networks, Inc., a Delaware Corporation, a filing corporation with the SEC; whose stock has never traded. I understand that I would assume this position upon the closing of the current round of financing; being completed by M.R. Beal. It is also my understanding that Mr. Richard K Collins . . . will assume the position of President and Chief Executive Officer of The New York Networks Inc., at the same time."

25. As noted, the 2006 private placement memorandum listed Mad Engine's address as that of NYN-Caliper.

²⁴ This Finding is based on a declaration Diane executed on July 1, 2009.

²⁵ Amato claimed *inter alia* that he never received the promised \$17.5 million; Walsh claimed *inter alia* that Amato refused to pay for a required audit of his company, which was a condition precedent to acquisition of Mad Engine. Amato claimed that he did not pay for the audit because NYN-Caliper (which he denied owning) was not in good standing and because Beal had pulled out of the deal.

26. In November 2006, Walsh's attorney Cassidy sent Amato a list of NYN investors along with subscription agreement signature pages for each investor, "for acceptance and execution by the Company." On November 10, 2006, Amato signed each of these documents in his capacity as Chairman of NYN.²⁶ No evidence in the record reflects that respondent or any individual other than Amato signed subscription agreements.

27. According to an SEC Form 10QSB filing and attached certification dated November 14, 2006, Amato was the President, Director, Chief Executive Officer, Chief Financial Officer, and Principal Accounting Officer of NYN-Caliper as of that date. Respondent's name did not appear on this document.

28. According to an SEC filing dated April 2, 2007, Amato was the President of NYN-Caliper on that date. Respondent's name did not appear on this document.

29. According to a webpage at www.thenewyorknetworks.com as it existed on March 7, 2008, Amato was the Chairman of the Board and CEO of NYN as of that date. Respondent's name did not appear on this webpage.

30. Amato testified that in around June or July 2007, he resigned from his positions with NYN.

31. Respondent denied that he was ever a director, officer, or shareholder of NYN-Caliper. Amato testified that respondent was the major shareholder and chairman of, and controlled, NYN-Caliper.

32. In an August 25, 2009, declaration, Don Maddalon wrote that as an employee of Integrity Stock Transfer, located in Las Vegas, Nevada, and based on his past business relationship with respondent, Maddalon agreed to act as the transfer agent for the issuance of stock certificates on behalf of NYN-Jubilee. In that capacity, Maddalon caused stock certificates to be prepared with respondent's signature. Some time later, Maddalon was informed that NYN was being merged with a shell company supplied by Cassidy, and that the merged company would be known as New York Networks, Inc. It was Maddalon's understanding that the chairman of the merged New York Networks, Inc. was to be Amato, and that this corporation was "the same New York Networks originally headed by" respondent. Later, Maddalon began to receive checks from investors in New York Networks, Inc., which he forwarded to Cassidy. When Cassidy informed Maddalon as to which of the investors were "qualified" investors and thus should be issued stock certificates, Maddalon issued the certificates to those individuals. Maddalon did not know that "the New York Networks headed by Mr. Amato was a different corporation than the New York Networks previously headed by" respondent. The only certificates Maddalon had in his possession were those of NYN-Jubilee, which already bore respondent's signature.

²⁶ Amato testified that he signed the subscription agreements only because he was "forced" to.

Apparently,²⁷ Maddalon decided to issue these certificates. He did so without instruction from respondent, and without respondent's knowledge.

33. Respondent testified that it was not until April or May 2007 that he first saw his name and signature on NYN-Caliper stock certificates. Respondent confirmed that he never instructed Maddalon to issue such certificates in his name. When he saw these certificates, he spoke to Maddalon about this matter. Maddalon told him that he (Maddalon) was getting pressure from investors to issue NYN-Caliper certificates, so he wrote the NYN-Caliper CUSIP number on old NYN-Jubilee certificates so that they could be issued. Maddalon knew that it should have been Amato's signature on the certificates, but Amato had not yet sent his signature to Maddalon. Further, it was Maddalon's understanding that the only thing that mattered, in terms of identifying the corporation, was the CUSIP number, and that it would thus not be a problem to issue the certificates with respondent's signature on them.

34. Edwards testified that he believed, but was not certain ("I do not fully recall") that respondent told him that he was President of NYN. Later, he said he was told this by Jensen, in a context which at least suggested that Jensen was the only or at least the first source of this information. Elsewhere, Edwards stated that respondent was essentially *in the process* of taking on "a larger position in ownership of New York Networks." He also testified that it was his "understanding" that respondent controlled NYN.

35. The record is confusing and at times contradictory with regard to respondent's relationship, if any, with NYN-Caliper. However, based on the record as a whole, including but not limited to the matters described in this portion of the Proposed Decision, it was not established that respondent owned or controlled NYN-Caliper as either a shareholder, director, or officer at any relevant period. This finding was strongly supported by the substantial documentation described above, which is accorded greater weight than the somewhat hazy recollections of investors as to statements respondent and others may have made several years ago.

Agency Status of Jensen and Preciado

36. Edwards and Evans both testified to their belief that Jensen was working for or with respondent and/or that respondent was the person in authority at the sales presentations. For example, Edwards testified that it was "obvious" to him that respondent was in charge of the sales presentation he attended, in that respondent came across as an authority on the subject of mergers. Further, on a number of occasions when questions were asked, the other presenters referred such questions to respondent. Evans testified that "it seemed like Chris Jensen and David Walsh were working together" and that he "understood" that Jensen was working for respondent. Elsewhere, however, Evans testified that he "came to the assumption that . . . Chris was pretty much directing the whole thing" and "it just seemed to

²⁷ That Maddalon issued these certificates is inferred from his declaration, though it is not explicitly stated therein.

me that they [Jensen and respondent] were working together." Evidence was presented that Jensen stated that he was working with or for respondent. No evidence was presented that respondent *himself* ever made such a statement, nor was any evidence presented that clearly established respondent to have been present when Jensen made any such statements.

37. Respondent testified he did not retain the services of Jensen or Preciado, but that Amato did so. Amato, on the other hand, testified that he did not retain their services, but believed that respondent had done so. Neither Jensen nor Preciado testified and no documentation was proffered that reflected their precise role or who in fact retained them.

38. Based on the evidence as a whole, including the foregoing matters, it was not established that Jensen and Preciado were respondent's agents. The evidence supporting such a relationship consisted largely of opinions based on supposition and vague recollections of statements made by Jensen. Such weak hearsay evidence was insufficient to establish agency.

Ultimate Findings

39. Based on the foregoing Findings and the record as a whole, it was not established that respondent offered or sold securities by virtue of an agency relationship with Jensen or Preciado, or by virtue of his ownership or control of NYN-Caliper as a controlling shareholder, director, or officer.²⁸

40. Based on the foregoing Findings and the record as a whole, it was not established that respondent offered or sold securities by virtue of his own statements and actions at sales presentations or other times. Of particular significance in this connection are the questionnaires filled out by Edwards, Evans, and other investors, who identified Jensen and at times other individuals, but never respondent, as the persons who solicited their investment. In light of this evidence, the statements by and about respondent and his involvement with NYN-Caliper and its business plan recalled by investors were not specific or clear enough to meet the Commissioner's burden of proof so as to implicate respondent as a seller or offeror of the corporation's securities.

41. Based on the foregoing Findings and the record as a whole, it was not established that respondent made untrue statements of material fact with regard to NYN-Caliper. This Finding is based on two matters in particular.

First, it was not established that *anyone* made untrue statements of material fact. With regard to the statements that NYN-Caliper would acquire Mad Engine and would then

²⁸ Further, respondent's prior ownership of NYN-Jubilee is irrelevant, since NYN-Jubilee was not the corporation whose securities were offered or sold to the investors involved in this proceeding. That investors were not aware of the existence of NYN-Jubilee has no bearing on this proceeding. For example, no evidence was offered of any sort of "bait and switch" between the two corporations. Nor was it established that NYN-Jubilee was dissolved and NYN-Caliper was created with any intent to mislead investors or to circumvent regulatory requirements of the Corporations Code.

"go public," the evidence did not establish that when these statements were made, no such intent actually existed. Instead, the evidence established that the parties fully intended to accomplish these objectives. It was only later that unanticipated events caused those plans to unravel.²⁹ Accordingly, the statements were not untrue when made. With regard to the statement that NYN-Caliper would greatly increase in value, this prediction was necessarily premised on the accomplishment of the acquisition and public listing of the corporation. Further, the evidence did not reflect that any "guarantees" were made in this regard. References to a "sure thing" and similar statements must be viewed in the context of other statements, such as that there would be "little or no risk" (which implied that there was in fact *some* risk). Further, that the memory of witnesses may have become a bit hazy several years after the events in question is reflected in such preliminary qualifications in their testimony as "from what I can remember" and they "gave me the impression."

Second, even if any of the statements made in connection with the sale of NYN-Caliper constituted untrue statements of material fact, the evidence did not establish that respondent made such statements. For the most part, the witnesses testified in such terms as "they were saying," "we were told," and "I was under the impression." Such statements were not attributed directly to respondent and they were not sufficient to establish that respondent himself made whatever statements might conceivably be deemed to be an untrue statement of material fact, assuming *arguendo* and contrary to the Finding immediately above, that any such statements were in fact made.

LEGAL CONCLUSIONS

1. Absent a statute to the contrary, the burden of proof in administrative disciplinary proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The burden of proof with regard to the alleged violations of sections 25110 and 25401 in this proceeding is thus on the Commissioner. On the other hand, the burden of proof with regard to any exemption to qualification of the securities at issue is on respondent. (Corp. Code, § 25163.) The standard of proof in either case is proof by a preponderance of the evidence (Evid. Code, § 115.)

2. Corporations Code section 25532 provides in part:

"(a) If, in the opinion of the commissioner, (1) the sale of a security is subject to qualification under this law and it is being or has been offered or sold without first being qualified, the commissioner may order the issuer or offeror of the security to desist and refrain from the further offer or sale of the security until qualification has been made under this law or (2) the sale of a security is subject to

²⁹ Whether Amato or respondent was at fault for the failure to acquire Mad Engine is irrelevant. Evidence that respondent was at fault might in theory be relevant under unusual circumstances, e.g., evidence that he intentionally undermined the acquisition which could arguably reflect an intention *ab initio* not to acquire the corporation. No such evidence was presented and no such argument was made in this proceeding.

the requirements of Section 25100.1, 25101.1, or 25102.1 and the security is being or has been offered or sold without first meeting the requirements of those sections, the commissioner may order the issuer or offeror of that security to desist and refrain from the further offer or sale of the security until those requirements have been met. . . .”

3. Corporations Code section 25110 provides:

“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 . . . or unless such security or transaction is exempted or not subject to qualification. . . .”

4. Corporations Code section 25017 provides:

“(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. . . .”

These definitions do not shed light on what conduct of an individual constitutes a sale or offer in the context of the facts found in this proceeding. As a general principle, it is appropriate to construe the regulatory provisions of the Corporations Code broadly so as to afford maximum protection for investors against the improper conduct in the course of the sale and offer of securities. That general principle likewise is of little assistance, however, in assessing whether the activities of respondent found above properly fall within the scope of these provisions. While the facts found above establish that respondent was involved in some way with the sale or offer of securities, no authority was offered that such “involvement” constituted a sale or an offer.

5. Corporations Code section 25401 provides:

“It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state 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 made, in the light of the circumstances under which they were made, not misleading.”

No authority was offered in support of the contention that statements of future intention and prediction can constitute untrue statements of material fact, at least absent evidence the individual making the statements knew at the time that they were untrue.³⁰

6. Civil Code section 2307 provides, "An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification." Civil Code section 2300 provides, "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." The Commissioner apparently relies on an ostensible agency theory in support of its argument that Jensen and Preciado were respondent's agents. However, the evidence did not establish that respondent intentionally, or by want of ordinary care, caused any investor to believe Jensen or Preciado to be his agents.

7. Based on Factual Findings 1 through 41, and Legal Conclusions 1 through 6, it is concluded:

a. Respondent did not offer or sell securities in the form of common stock and warrants, when such securities were neither qualified nor exempt from qualification, in violation of section 25110.³¹

b. Respondent did not make any untrue statements of material fact in connection with the sale or offer of securities in violation of section 25401.

ORDER

The Desist and Refrain Order signed on July 21, 2008 directed to respondent David E. Walsh is vacated in its entirety.

DATED: 1-4-10



DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

³⁰ Cf. *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 54 Cal.App.4th 547, 575 ("promissory fraud," as a matter of tort law, "consists of making a promise without the present intention to perform it, i.e., misrepresenting the speaker's then-present intentions).

³¹ In light of the bases upon which this conclusion was reached, respondent's argument that the securities were exempt from qualification pursuant to 15 U.S.C. section 77r and SEC Regulation D need not be addressed.