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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE ex rel. PRESTON DUFAUCHARD, as Corporations Commissioner, etc., Plaintiff and Respondent, v. ANTHONY O'NEAL, Defendant and Appellant.	B209612 (Los Angeles County Super. Ct. No. BC360749)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph Kalin and Aurelio N. Munoz, Judges. Judgment is affirmed in part and remanded for further proceedings.

Preston DuFauchard, Alan S. Weinger, and Uche L. Enenwali for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts 2 through 17 of the FACTUAL AND PROCEDURAL BACKGROUND, and parts 3 through 6 of the DISCUSSION.

Edmund G. Brown Jr., Attorney General, J. Matthew Rodriguez, Chief Assistant Attorney General, Mark J. Breckler, Senior Assistant Attorney General and Jon M. Ichinaga, Supervising Deputy Attorney General, for Amicus Curiae for Plaintiff and Respondent.

Collins & Bellenghi and Michael J. Collins and Julian B. Bellenghi for Defendant and Appellant.

Those who violate the Corporate Securities Law of 1968 may be exposed to criminal sanctions, civil suits, and administrative enforcement actions brought by the Commissioner of Corporations (Commissioner). In this case, the Commissioner brought an administrative action against defendant Anthony O'Neal for: (1) the offer and sale of unqualified, non-exempt securities; and (2) fraud in the offer and sale of securities. Defendant and Otha Cole[1] had created a business in which they convinced several individuals to invest by means of poorly drafted Principal Investment Agreements (PIAs), which were signed by the individuals and Cole, but not defendant. Defendant and Cole misused investors' funds and the business failed.

After a bench trial, the trial court concluded defendant had violated both pleaded provisions of the securities law, enjoined defendant from further violations, and ordered him to pay restitution and civil penalties. In the published portion of this opinion, we consider, and reject, defendant's argument that he cannot be held liable in an administrative enforcement action and required to pay restitution to his victims unless he was in contractual privity with them – a requirement imposed in civil actions for the identical securities law violations. In the unpublished portion of the opinion, we address defendant's other, factually-dependent, contentions. We affirm in part and remand for further findings.

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[1] Cole died prior to trial; his deposition was admitted into evidence at defendant's trial.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The LadyCare Device and Business*

LadyCare is an alternative medical device, designed to reduce menstrual cramps and discomfort. Less charitably described, it is a magnet intended to be worn inside the underwear.

LadyCare is also the name of a business operated by Cole and defendant, which had the stated goal of distributing the LadyCare magnetic device in the United States and Canada. LadyCare, as a business, never existed as a legal entity. Instead, Cole and defendant conducted the LadyCare business, in part, through two corporations: Innerplanetary Enterprise, Inc. (Innerplanetary), and ICJ Health, Inc. (ICJ Health).

It is undisputed that Cole first introduced the LadyCare product and the idea of the LadyCare business to defendant. Defendant asserted, at trial, that he was merely an investor in LadyCare, who lost money just as the other investors did. The trial court concluded, however, that defendant was deeply involved in the business and the sales of securities to investors. As we discuss at length in the unpublished portion of the opinion, substantial evidence supports the conclusions of the trial court.

2. *LadyCare Prior to Defendant's Involvement*

Cole initially learned of the LadyCare device from an alternative medicine practitioner from London. Cole then obtained 100 LadyCare devices, which he distributed for free as a test.[2] Claiming to have received unanimous positive feedback

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[2] Cole testified that he selected only women with severe menstrual cramps for his test, and that most of the devices were distributed "through doctors." Specifically, he

from the women who tried the device, Cole planned to start selling it. He intended to test market LadyCare in Canada to "get a snapshot of what we could do," and then market the product in the United States. Cole's intent was to purchase the product for $4, and sell it for $39. He believed LadyCare could generate $10 million profit in the United States.

On October 31, 2002, Cole incorporated Innerplanetary in Nevada. Innerplanetary would ultimately engage counsel to prepare a private placement memorandum to attract investors in a United States LadyCare corporation. It does not appear that the private placement memorandum was ever finalized.

3. *Defendant's Initial Involvement in LadyCare*

Defendant met Cole through their common membership in From the Heart Church Ministries. They met in June of 2003, and by July, defendant was involved in the LadyCare operation. A July 9, 2003 "LadyCare Lifetime, Inc."[3] meeting agenda indicates that Cole was to provide an overview while defendant was responsible for the discussion of "Warehousing."[4]

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identified Leroy Cofield, a nurse practitioner and doctor of naturopathics as someone who "passed them out." Cofield testified, however, that he did not use LadyCare in his practice and that his only experience with the product was that he "[g]ot one which [his] wife tried."

[3] There is no such corporation.

[4] Defendant's prior job was as a warehouse supervisor.

4. *The Principal Investment Agreements*

Cole, without the assistance of counsel, drafted a PIA to be executed by individuals investing in the LadyCare business. The document is largely unintelligible, but purports to be an agreement between Cole (as principal) and the investor.[5] The "Scope of Services" paragraph indicates that Cole "shall work with investments of Investor . . . by way of introducing to the USA LadyCare LifeTime and operational for the sole purpose of providing product to the public for a fee; finish all area of advertising and commercializing of said product on local and national Cable Television." While this language is, in several ways, incomprehensible, it appears to indicate that Cole promised to use the investors' funds to advertise the LadyCare product in the United States.

Under the PIA, the investor was to receive the entire amount of the investment back and a 100% profit, although the time period in which this was promised is

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[5] The first numbered paragraph of the PIA states, "This Company makes it possible for certain members of a particular, but private, sector to invest only through personal representative. See Exhibit 'A' attached hereto." Exhibit "A" states, in its entirety, "This Company makes it possible for certain members of a particular, but private, sector to invest by offering a limited short-term investment opportunity through personal representative. These limited short-term investment opportunities are private, however, and are closed to any second generation references, and all accepted parties should be informed of same." The PIA makes no further identification of the "Company." As to the personal representative, the PIA states that "Investor hereby retains Principal to render services to Investor as requested by Investor's personal representative," yet no personal representative is identified and the PIA was always executed directly by Cole and the investor.

somewhat unclear.[6] The PIA also indicates that "[a]ll of the needs and preparation for the sale and marketing of the LadyCare Lifetime product is [*sic*] completely in place." An attached exhibit identifies "Completed Items to Date," including, "All printed literature (brochures, flyers, letterhead, business cards)," "All products up to 350 plus thousand product," "Fulfillment Center/Warehousing," "Installation of 100 phone lines," and "Full campaign, radio, TV, and print commercial in place."

Defendant was the first to execute a PIA, signing his agreement on August 27, 2003. Shortly thereafter, he shared the LadyCare business opportunity with his close friends and family. His mother, mother-in-law, and sister-in-law each signed PIAs shortly after defendant did. Two of his friends, each of whom he had known for approximately 20 years, also signed PIAs. None of defendant's relatives and close friends testified at the trial, and the trial court's findings were not based on their investments.[7]

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[6] As with the rest of the PIA, this clause is poorly drafted. It reads: "The terms of this Agreement herewith shall be six (6) months after product introduction to mass markets, principal amount of . . . investment shall be paid in full and in accordance with the success of the business within a 12-month period; and, an additional 100 percent of said investment shall be paid as interest." Is the principal to be repaid within six months, 12 months, or depending on the success of the business? Is the semi-colon misplaced? Is the 100% profit to be repaid within 12 months?

[7] We note, however, the following timeline. Defendant and Cole both signed defendant's PIA on August 27, 2003. On the following day, Cole executed the PIAs for defendant's mother, mother-in-law sister-in-law, and one of defendant's close friends. Each of those investors, however, did not sign his or her PIA until some later date. This suggests that Cole was not present when these investors signed, and that, instead, defendant was responsible for obtaining their signatures.

5. *The Reed, Belisle and Cofield Investments*

LadyCare obtained three more investors in the last quarter of 2003: Lula Reed, the Belisles, and the Cofields.

On October 9, 2003, Lula Reed signed a PIA investing in the LadyCare business. Reed had known defendant "for quite some time." She had lost touch with him for a period, then saw him again and realized that he was the same person she had known from years before. They had "just kind of remained friends." Reed's adult daughter had been thinking about investing in LadyCare. Reed then spoke to defendant about it. Defendant told Reed "a little bit about the business." A meeting was arranged with Cole, defendant and Reed at a restaurant. Defendant was present while Cole went over the PIA with Reed, and told her she would have "some funds" in six months. Reed had no investment experience; she was not informed of the risks of the investment. She invested $2,500 in the LadyCare business.

On October 14, 2003, Arthur and Yolanda Belisle signed a PIA investing $15,000 in the LadyCare business. Yolanda Belisle had met defendant at church in early 2003; Yolanda Belisle was a greeter, so she spoke with everyone who came to the church. Defendant "seemed like a nice man." In mid-September 2003, defendant approached Yolanda Belisle at church, told her that he knew of a good investment opportunity, and asked if she was interested. The Belisles agreed to talk further about it. Defendant arranged a meeting in which he and Cole went to the Belisles' home to discuss LadyCare. At the meeting, defendant did most of the talking. Defendant told

the Belisles that they would "definitely get [their] money back." The Belisles withdrew $15,000 from Arthur Belisle's retirement account and invested it in LadyCare. They agreed to invest because defendant told them it was a good product.[8]

On December 19, 2003, Leroy and Leah Cofield signed a PIA investing $10,000 in the LadyCare business. Leroy Cofield had known defendant as a fellow congregant at church. Defendant, who had no real financial experience,[9] had given a financial seminar at the church. The Cofields wanted to improve their credit rating and get out of debt, so they asked defendant for advice after the seminar. Defendant suggested that the Cofields refinance their house; he recommended Cole to do the refinance. The Cofields met with Cole, who refinanced their mortgage through his realty company. The Cofields received $60,000 from the refinance; they used some of the money to pay off debt and put the rest in the bank. Some time later, defendant told the Cofields about LadyCare, and that it was a good investment, but defendant told them that it was "closed" to new investors. Less than two weeks later, defendant called the Cofields and told them that LadyCare was taking investors; Leroy Cofield said that he was interested. Cole then called Leroy Cofield and asked how much the Cofields could invest. Within

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[8] Cole testified that he knew that the Belisles were about to retire and did not have the wherewithal to invest, but he allowed them to do so because they all attended the same church.

[9] Defendant was a deacon in the finance department at the From the Heart Ministries Church. He did not do any bookkeeping; his job consisted of collecting the offering envelopes and counting them. Prior to that, he had never been involved in financial endeavors. Defendant had attempted to study business at a community college, but his grades were inadequate and he had to drop out of that line of study.

48 hours, defendant, but not Cole, met the Cofields and gave them the PIA, which the Cofields signed. The Cofields made their check out to "Otha Cole; Lady Care Lifetime Investment." Cole met them near the bank to pick up the check. Leroy Cofield was led to believe that LadyCare was a corporation. Defendant had told Leroy Cofield that he was "kind of . . . Cole's financial officer." Defendant had told Leroy Cofield that they had already test marketed the LadyCare device and that it was expected to be very successful. Cole confirmed that the Cofields would get 100% of their investment back within six months, as they were just about to launch the product. Leroy Cofield was an investment novice; he trusted defendant's assurances as well as Cole's business acumen.

6. *Last Quarter 2003 LadyCare Operations*

While defendant and Cole were obtaining $27,500 from Reed, the Belisles, and the Cofields, they had not, in fact, already successfully test marketed LadyCare. Despite the representations in the PIA, everything necessary to sell and market the LadyCare product was not "completely in place." In fact, none of it was.

On October 30, 2003, defendant became the treasurer of Innerplanetary.[10] On November 5, 2003, defendant opened a corporate bank account for Innerplanetary; defendant and Cole were the two authorized signatories. Thereafter, defendant began writing checks on the Innerplanetary account.[11] Indeed, Cole would later tell an

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[10] Cole testified that defendant was "never" an officer of a corporation in which Cole was involved; this is belied by the record.

[11] Defendant's suggestion that he was just another investor is belied by his signature on the checks, among many other things.

examiner from the Department of Corporations that defendant handled all financial matters regarding LadyCare.

The plan to test market the LadyCare device in Canada began in Vancouver. Cole would later testify that although they advertised LadyCare in Vancouver, they were unable to sell products there. But by the end of 2003, when defendant was representing that the device had been successfully test marketed, the LadyCare business had not only not had a *successful* test marketing, it had not even *begun* to test market the device. In fact, the record indicates that nobody involved with the LadyCare business even *went to Canada* prior to 2004.[12]

While the record does not indicate the precise disposition of the 2003 investors' funds, it appears that LadyCare was using them for non-business-related expenses. In addition to defendant and Cole, two other individuals were also engaged in the LadyCare business, Andrea Tezino and Shawn Grant. A document prepared by defendant entitled "Company Expenses," indicates that, in December 2003, the "Company" paid for Grant to attend a church retreat in Maryland.

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[12] Cole testified that LadyCare was in business in Canada "[f]rom the beginning of 2003." There is an overwhelming amount of evidence to the contrary. ICJ Health, the corporation under which the LadyCare business eventually operated in Canada, did not even exist until 2004. On May 31, 2004, ICJ Health issued a press release announcing the availability of the LadyCare device in Canada, and indicating that it "goes on sale June 1." A document entitled "Ladycare Sales and Expenses 2004/2005" has no entries prior to May 2004.

7. *LadyCare Operations Prior to the Next Investor*

The next relevant LadyCare investment did not occur until March 18, 2004.[13] In the meantime, defendant and Cole began LadyCare operations in Canada. On January 5, 2004, defendant, Cole and Green made a one-day trip to Vancouver. Trips to Vancouver would continue through September 2004.

On January 21, 2004, ICJ Health was incorporated in British Columbia. It had three shareholders – Cole, defendant, and Tezino – each of whom had 100,000 shares of common stock. The same three individuals were identified as the first directors of the corporation.[14] At some point, defendant applied for a Visa Platinum card.[15] On his application, he identified himself as the Chief Financial Officer of ICJ Health.[16] Defendant would sign all ICJ Health checks concerning the LadyCare business. Defendant was considered the controller for the business, and admitted preparing all of the LadyCare financial documents in evidence.

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[13] The record makes reference to a few other LadyCare investors by name, but there is little evidence regarding the timing, amount, and circumstances of their investments. The case did not proceed against defendant on the basis of these investments.

[14] Cole testified that defendant "just was a volunteer," and that he "never was a person that was involved in the business or the planning of anything that happened." Cole testified that he gave defendant 100,000 shares of ICJ Health because he was a "major investor" who was "helping [Cole] out." This does not explain why defendant was a *director* of ICJ Health.

[15] It is impossible to determine the date of the application, as defendant mistakenly put his birth date in the space for the date of his signature.

[16] He stated on the application that his annual salary was $160,000 per year, plus $75,000 per year in bonuses.

A document entitled "[Defendant]'s Expense Report" runs from November 2003 to February 3, 2004. A note after the last entry[17] refers to an unknown "Najera loan," and reads, in part, "$875 will be applied to the filing cabinets. So out of the Najera loan I only received $875 towards bills. WE ARE GETTING FAR BEHIND." A later version of defendant's expense report indicates that on February 12, 2004, a check for $6050 "bounced causing major problems." Defendant adds that Cole "only gave me $5450 to cover the check making matters worst [*sic*]."

8. *The Canns' Investment*

On March 18, 2004, Samuel and Jacqueline Cann signed a PIA investing $10,000 in the LadyCare business. Samuel Cann had attended the same church as O'Neal and Cole in California, but moved to the Washington D.C. area in June 2003. He had no relationship with defendant beyond being members of the same church. He knew Cole a bit better, and had stayed at Cole's house two or three times. He knew nothing of Cole's business character, or his "track record" in business. At some point in 2004, the Canns refinanced the mortgage on their Virginia home; Cole handled the refinance for them (by wire). The Canns received cash back from their refinance. At that point, Cole told Samuel Cann about the LadyCare business opportunity. Cole promised 100% return on their investment within six months. Cole told the Canns that the business was doing very well in Canada, and suggested that the Canns could be the distributors of the LadyCare product in the Washington D.C. area. The Canns agreed to

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[17] The last entry is a payment to Countrywide, identified as "[Green]'s Rent."

invest. Cole told Samuel Cann to give his investment money to defendant; Cole also told him that if Cole was unavailable, he could always speak with defendant. The Canns' money was transferred directly into defendant's account.

Defendant prepared a financial statement detailing the partial distribution of the Canns' investment. $1,889 of the Canns' investment was used to pay Tezino's rent. The Canns had not authorized LadyCare to use their investment for personal expenses.

9. *LadyCare's Continued Operations*

By this time, six months had passed from Reed's initial investment. Reed called Cole and asked where her money was. Cole told her it was coming; it never did.

LadyCare continued incurring substantial expenses. Cole and O'Neal travelled to Vancouver again. The largest expense, however, was a payment of over $30,000 in April 2004 for LadyCare products from England. This establishes that the statement in the PIAs that LadyCare already had "[a]ll products up to 350 plus thousand product" in place was a falsehood. An April 2004 entry in defendant's "Canada Expenses" sheet includes a "set-up fee" for "Integrated Fulfillment,"[18] indicating that "Fulfillment Center/Warehousing," was also not in place earlier, as had been represented in the PIAs. ICJ Health business cards were printed in May 2004, with the LadyCare logo; "business cards" had also been represented as completed in the PIAs. Defendant's business card identifies him as "CFO."

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[18] A May 2004 e-mail from Integrated Fulfillment to defendant alone confirms that defendant was handling fulfillment issues for the LadyCare business.

10. *The Browns' Investment*

On May 26, 2004, Donald and Astrid Brown invested a total of $25,000 in LadyCare. Donald Brown signed a PIA for his investment. Donald Brown had been introduced to Cole by Leroy Cofield. Cole refinanced the Browns' home, and the Browns then invested the money they obtained from the refinance. The first check invested by the Browns was for $15,000; they made that check out to defendant. Subsequently, they invested an additional $10,000 with checks made out to Cole.

11. *LadyCare's Vancouver Test Marketing Fails*

On May 31, 2004, ICJ Health issued a press release trumpeting that the LadyCare device "goes on sale June 1." Radio advertising was purchased. The women of Vancouver, however, were not interested in wearing magnets in their underwear. Sales in June 2004 consisted of 4 units; in July 2004, LadyCare sold an additional 3 units. August 2004 sales were somewhat better; LadyCare sold approximately 30 units.

Defendant and Cole responded to this apparent failure by recklessly spending their investors' money. On a July 2004 trip to Vancouver, instead of renting a car, defendant hired a limousine[19] – not only to take them to and from the airport, but also

[19] Cole testified that LadyCare never rented limousines in Canada and that "[a] taxi is called a limousine over there." The invoices from "Experiencia Limousine, Inc." at a rate of $85 per hour suggest otherwise.

on two trips (to unknown destinations) during their short stay. The limousine bills for this Vancouver trip combined to over $800.[20]

12. *August 2004 Investors*

Defendant and Cole obtained two more LadyCare investors in 2004, Betty Hadrick and Mary Grayson.

On August 9, 2004, Betty Hadrick signed a PIA investing $10,000 in the LadyCare business. By September 2004, she invested an additional $20,000.[21] Hadrick did not know defendant or Cole prior to March of 2004. At that time, she wanted to refinance her house. Hadrick's aunt, who went to the same church as defendant, recommended defendant to her for the refinance. Defendant refinanced Hadrick's house for her, through Cole's company. The refinancing process lasted from March 2004 until August 2004. During this time, defendant would often tell Hadrick that she could not reach him because he would be out of town on business for LadyCare. Hadrick was to receive $30,000 from the refinancing of her home; she asked defendant if he knew of a place where she could invest her money wisely. Defendant recommended LadyCare. Hadrick told defendant that she did not want her money locked up for a long time; defendant assured her that there would be a quick return if she invested in LadyCare. He promised that she would get her money back and earn a profit "for sure." At the end

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[20] This amount may be in Canadian dollars.

[21] Defendant relies on evidence that Hadrick invested only an additional $10,000. While there is such evidence, the trial court could rely on Hadrick's testimony that she invested an additional $20,000, for a total investment of $30,000.

of the refinancing process, defendant arranged a dinner meeting about LadyCare, attended by Hadrick, Cole and defendant. Defendant and Cole guaranteed Hadrick a return and told her the company was profitable. They told her the market was up and running in Canada and that the business was "very successful." Hadrick was under the impression that LadyCare was a partnership or a business in which Cole was the president and defendant the vice president. When Hadrick invested $30,000 in LadyCare, her annual income was $52,000. Each of Hadrick's investment checks was made out to defendant, at defendant's direction.

On August 16, 2004, Mary Grayson signed a PIA investing $15,000 in LadyCare. Grayson knew defendant from church and considered him to be a friend; she knew that he had given a finance seminar at church. She did not learn about LadyCare from defendant, though. Instead, she learned about it from Cole, when he refinanced her home. (Cole had known that Grayson was considering a refinance, and offered his services to her.) Grayson invested in LadyCare the entire $15,000 she had received from her refinance. Cole told Grayson that she would receive her investment back plus a 100% profit within a year. Before investing, Grayson asked defendant if LadyCare was a good investment; defendant told her it was. Cole directed Grayson to make her check out to defendant; she did so. At the time Grayson invested $15,000 in LadyCare, she was earning $16,000 or $17,000 per year.

13. *The October Move To Calgary*

Upon LadyCare's inability to find a market in Vancouver, defendant and Cole did not give up; instead, they chose to try again in Calgary.[22] On October 23 and 24, 2004, LadyCare had some exhibition space at the Calgary Woman's Show. Defendant was responsible for ordering furnishings, plants and electrical hook-ups for the exhibition booth.

The trade show resulted in LadyCare's best month ever; LadyCare sold approximately 50 devices. However, 33 of those devices were sold at a reduced "trade show special" price. Defendant's sales report indicates total sales of $2,111.34 for the month of October 2004. This amount however, was overshadowed by the associated expenses, which included $2,650 for trade show costs. LadyCare spent an additional $2,640 in airfare to Calgary and $3,120 in Calgary hotel rooms. This does not include the cost of the devices itself, nor any of the advertising LadyCare purchased in Canada.

As Hadrick had recently invested $30,000 in the business, defendant invited her to accompany the LadyCare team to Calgary; LadyCare paid her travel expenses. According to Hadrick, both defendant and Cole were making decisions about the LadyCare business in Canada.

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[22] LadyCare did not cancel advertising in Vancouver until November 2004.

14. *Petra Stoute's Investment*

Petra Stoute invested $35,000 in LadyCare, although she did not sign a PIA.[23] Stoute had no prior relationship with Cole or defendant, although she had seen them in church. She knew nothing about their characters as related to business. Stoute was referred to Cole by Grayson for a refinance of her home. Cole did the refinance for her in August 2004; defendant was part of the process and helped Stoute with obtaining her husband's death certificate for the refinance. During the refinance, defendant sat Stoute down in the office and told her that she should consider investing her money.

The refinance was completed near the end of September 2004. Stoute was retired at the time, and receiving social security. She had also been diagnosed with cancer. Cole drove Stoute to the bank, presumably to obtain the proceeds from the refinance, and asked her to write two checks: a $15,000 check to Cole's wife and a $20,000 check to defendant. Stoute asked why she should write a check to Cole's wife. Cole told her that his wife had a business; he did not give her any details. Stoute gave Cole the checks, expecting Cole and defendant to invest her money. Cole promised Stoute that she would receive $3,000 per month, like a pension, and could have $10,000 if she needed it for her house in November. She never received the promised funds. Eventually, Stoute asked Cole's wife about her money; Cole's wife

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[23] Cole testified that Stoute is not educated. Cole believed that Stoute had only turned against him because the Commissioner's investigator told her that it was the only way she would get her money back. Cole said that Stoute could not have read or understood a declaration which she had signed for the investigator. Presumably, this inability would extend to a PIA.

told her that it had been invested in LadyCare in Canada. Stoute repeatedly asked Cole for documentation reflecting her investment; in January 2005, Cole sent her a LadyCare PIA dated in October 2004.

Both of Stoute's checks are dated October 4, 2004. Defendant prepared a document indicating the allocation of "[Stoute]'s $20,000 Investment." $5,000 of the investment was given to Lisa Adams. Lisa Adams is an earlier investor; LadyCare used Stoute's funds to refund part of Adams's investment. Other items to which Stoute's $20,000 was applied include Tezino's insurance and defendant's cellular telephone bill. A notation on defendant's "Obligations for September/October" indicates that Cole "paid his rent out of the [Stoute] Loan," a $2,300 expense.

15. *LadyCare's Failure in Calgary*

The few dozen sales in October 2004 did not translate into further market penetration. Indeed, LadyCare never again had a month with sales in the double-digits. LadyCare sold 5 units in November 2004 and 6 units in December 2004. On December 23, 2004, defendant signed an Innerplanetary check for $1500 to the Canns. The memo line indicates "partial return on Ladycare Inv." Defendant's notes indicate that he considered this a partial return of the Canns' $10,000 investment, with a "Balance[] owed" of $8500, overlooking the promised 100% return.

16. *The Final Investors*

On November 3, 2004, Lawrence and Phyllis Ward invested $25,000 in the LadyCare business. As we will discuss, the terms of the Wards' PIA were slightly different from the terms of the other investors' PIAs.

Cole met the Wards, at church, in July 2004. He invited them to his office to watch a video on the LadyCare product, and invited them to invest. Cole told them that LadyCare had one last slot open, and things were going fast. He told them that if they wanted to invest, they had to invest $25,000. Cole told the Wards that they would get their $25,000 back within six months, plus an additional $25,000 return. He told them that LadyCare was doing terrific business in Canada, and that it would begin marketing in the U.S. in January 2005. On November 3, 2004, the Wards obtained a $25,000 check for their LadyCare investment; they made it payable to Cole's wife, at Cole's direction.

The Wards did not sign their initial PIA; Cole said that he had a revised one which would have better terms for them. Under the revised PIA, which the Wards signed on December 16, 2004, the Wards would not receive a 100% return on their investment; instead, they would receive their initial investment back, and stock in the company. The term of the agreement was also extended from six months to 18-24 months.[24]

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[24] The above sets forth the terms as Phyllis Ward understood them. The revised PIA incomprehensibly reads, "The terms of this Agreement herewith shall be 18 to 24 months after product introduction to mass markets, principal amount of [$25,000] investment shall be paid in full and in accordance with the success of the business

17. *The End of LadyCare*

LadyCare's Canadian sales dribbled away to nothing. LadyCare sold 3 units in January 2005, and either 1 or zero units in each successive month through July 2005. When all was said and done, LadyCare sold a total of 127 units from May 2004 through July 2005 – just 27 more than the 100 units Cole had distributed for free. When defendant compared LadyCare's expenses to its income, he came to the conclusion that "Lady[C]are have a lost [*sic*] of $212,844.31."

Yolanda Belisle had repeatedly asked Cole for her money back; Cole told her to talk to defendant. Yolanda Belisle "nagged" defendant, and eventually received the Belisles' entire $15,000 investment back in three personal checks from defendant.[25] It is not clear precisely when the Belisles were repaid; they received a $4000 check from defendant in June 2005, and another for $1,500 in January 2006.[26]

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within a 6 to 12 month period; and, an additional 100 percent of said investment has been credited as interest on the original [$25,000] investment. A Suitability Agreement to qualify as an accredited investor as agreed making a total investment of [$50,000]. Company shall give 2 for 1 equaling [100,000] shares of stock." The "accredited investor" language may be the result of the fact that Innerplanetary had hired counsel to prepare a private placement memorandum to obtain funding to distribute the LadyCare device throughout North America. The language of the draft private placement memorandum, dated November 30, 2004, limits investment to "accredited investors," and only 35 non-accredited investors.

[25] Cole testified that *he* repaid the Belisles' money, out of his own personal funds.

[26] The $1,500 was apparently *not* part of the Belisles' original $15,000 investment, but an additional payment to cover the penalty the Belisles suffered when withdrawing the funds from Arthur Belisle's retirement account.

18. *The Complaint*

On October 23, 2008, the Commissioner brought an action against defendant, Cole, and "USA LadyCare Lifetime," under Corporations Code section 25530, which permits the Commissioner to bring an action to enjoin acts or practices in violation of securities law. The Commissioner may also seek restitution and civil penalties in such an action. (Corp. Code, §§ 25530, subd. (b); 25535.) As the Commissioner did not know the precise nature of the LadyCare entity, the Commissioner named USA LadyCare Lifetime as a corporation, a limited liability company, a partnership, a fictitious business name of defendant and/or Cole, and as the alter ego of defendant and Cole.[27]

Two causes of action were alleged against defendant: (1) the offer and sale of unqualified and non-exempt securities, specifically, the LadyCare PIAs; and (2) misrepresentations or omissions of material fact in the offer and sale of securities, including misrepresentations that the LadyCare investments would give a 100% return within six months. The Commissioner sought an injunction, restitution, and civil penalties of $25,000 per statutory violation.

19. *The Trial*

Defendant filed an answer and the case proceeded to a bench trial. Testimony was heard from the nine LadyCare investors discussed above, as well as an examiner from the Department of Corporations. Defendant testified on his own behalf, as did

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[27] Cole and defendant were also alleged to be corporate officers of, partners in, control persons of, and individuals doing business as, USA LadyCare Lifetime.

Cole (by deposition). Defendant testified that he had no control over the LadyCare operations; Cole had made all of the decisions. Cole agreed. As set forth at length above, the documentary evidence and investor testimony was to the contrary.

20. *Statement of Decision, Judgment and Appeal*

On April 10, 2008, the trial court issued its proposed statement of decision. The court concluded that "USA LadyCare is not a recognized legal entity and is only a name used by . . . Cole and [defendant]." The trial court did not make specific factual findings regarding any individual investor. Instead, the trial court made numerous factual findings pertaining to the investors generally. For example, the trial court found that: defendant was present at meetings with investors; investors were told that defendant was vice president of LadyCare; defendant was involved in "securing and pushing" the investments; and investors made their checks out to defendant. Additionally, the trial court found numerous facts pertaining to defendant's involvement in the LadyCare business, including: defendant took business trips on behalf of LadyCare; defendant executed contracts for LadyCare; defendant was the CFO of Innerplanetary; and defendant was a signatory on the ICJ Health bank account and wrote checks. On the basis of these facts, the trial court found that defendant "was fully involved in the operation of LadyCare and was instrumental in convincing parties to invest in LadyCare." Finally, the trial court found that the PIAs were unqualified non-exempt securities, and that defendant and Cole made numerous misrepresentations and omissions in the offer and sale of those securities.

Based on its findings, the trial court concluded that defendant had violated Corporations Code sections 25110 (offer or sale of unqualified, non-exempt securities) and 25401 (fraud in the offer or sale of securities). As such, defendant was enjoined from further violations, directed to pay restitution in the amount of $202,000, and suffered nine $25,000 civil penalties, in the total amount of $225,000.

On April 22, 2008, defendant objected to the proposed statement of decision, arguing that the trial court failed to address four arguments he had raised at trial: (1) he was not in privity with the investors; (2) each investment was exempt from the qualification requirement as each investor had a pre-existing personal or business relationship with defendant or Cole; (3) he did not know the statements made to investors were false; and (4) he could not be liable for substantially assisting Cole in Cole's violations of the securities law. The trial court responded by stating that it had specifically found that defendant was a seller of the securities, fraudulently offered them for sale, and sold them – thereby rendering any legal arguments against substantial assistance liability moot. The court also stated that it had found defendant's exemption argument to be inapplicable. The trial court adopted its proposed statement of decision as its statement of decision.

Judgment was entered in accordance with the statement of decision on June 19, 2008. Defendant filed a timely notice of appeal.

ISSUES ON APPEAL

On appeal, defendant makes the following arguments: (1) as a matter of law, he can only be held liable for the alleged securities law violations if he was in privity with the investors, and the undisputed evidence is that he was not; (2) the PIAs were exempt from the qualification requirement because undisputed evidence establishes that a preexisting business or personal relationship existed between defendant or Cole and each investor; (3) he cannot be liable as a "principal" in LadyCare because LadyCare did not exist, and, to the extent that it did, he was not a control person in LadyCare; (4) there can be no civil liability on a theory of substantial assistance; (5) the undisputed evidence establishes that defendant himself made no fraudulent representations or material omissions to investors, nor was he aware of the falsity of any of his representations; and (6) restitution and the civil penalties were improperly calculated. We reject defendant's first two contentions; this conclusion mandates affirmance of the trial court's judgment in most respects. However, we conclude that defendant is not directly responsible with respect to one of the investors, requiring remand for the trial court to determine whether he is indirectly liable. We also conclude that restitution was improperly calculated.

DISCUSSION

1. *Overview of Relevant Provisions of Securities Law*

Before addressing defendant's contentions, a brief overview of the relevant provisions of the Corporations Code is helpful. First, we consider the substantive

provisions which defendant violated; then, we discuss the ways in which these provisions may be enforced.

We are concerned with the Corporate Securities Law of 1968. (Corp. Code, § 25000.) Defendant was found to have violated Corporations Code section 25110. That section provides that "[i] is unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such sale has been qualified under Section 25111, 25112 or 25113 . . . unless such security or transaction is exempted or not subject to qualification." It is conceded that the PIAs sold in this case are securities; it is also undisputed that the PIAs were sold in issuer transactions.[28] It is also conceded that the sales at issue were not qualified.[29]

Corporations Code section 25102 identifies securities which are exempt from Corporations Code section 25110. The sole exemption at issue in this case is found in Corporations Code section 25102, subdivision (f). It exempts from the qualification requirement, any offer or sale of any security, "in a transaction . . . that meets each of the following criteria: [¶] (1) Sales of the security are not made to more than 35 persons, including persons not in this state. (2) All purchasers either have

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[28] An issuer is any person who issues or proposes to issue any security. (Corp. Code, § 25010.) An issuer transaction is one in which "any portion of the purchase price of any securities involved in the transaction will be received indirectly by the issuer." (Corp. Code, § 25011.)

[29] Corporations Code section 25111 describes qualification in coordination with federal registration; Corporations Code section 25112 describes qualification by application to the Commissioner; Corporations Code section 25113 describes qualification by permit.

a preexisting personal or business relationship with the offeror or any of its partners, officers, directors or controlling persons, or managers . . . , or by reason of their business or financial experience or the business or financial experience of their professional advisers who are unaffiliated with and who are not compensated by the issuer . . . could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction. (3) Each purchaser represents that the purchaser is purchasing for the purchaser's own account . . . and not with a view to or for sale in connection with any distribution of the security. (4) The offer and sale of the security is not accomplished by the publication of any advertisement." This is known as the "private" security exemption. (*People v. Graham* (1985) 163 Cal.App.3d 1159, 1164.)

The second provision defendant was found to have violated is Corporations Code section 25401. That section 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."

There are three enforcement mechanisms provided for in the Corporate Securities Law of 1968: (1) criminal prosecution, (2) civil action, or (3) administrative action brought by the Commissioner. (*People v. Simon* (1995) 9 Cal.4th 493, 514-515.) A *willful* violation of the Corporate Securities Law of 1968 is a crime for which, upon

conviction, the violator may be fined up to $1,000,000 or imprisoned. (Corp. Code, § 25540.)

There are specific provisions dealing with civil actions for the violation of the two sections at issue in this case. A person who violates Corporations Code section 25110 "shall be liable to any person acquiring from him the security sold in violation of such section, *who may sue* to recover the consideration he paid for such security with interest thereon at the legal rate, less the amount of any income received therefrom, upon the tender of such security, or for damages, if he no longer owns the security, or if the consideration given for the security is not capable of being returned." (Corp. Code, § 25503, emphasis added.) Similarly, a person who violates section 25401 "shall be liable to the person who purchases a security from him . . . *who may sue* either for rescission or for damages." (Corp. Code, § 25501, Emphasis added.)

We are concerned here with neither a criminal prosecution nor a civil action brought by the people who purchased securities from defendant. Corporations Code section 25530 provides for administrative actions brought by the Commissioner. Subdivision (a) of that section provides, **"**Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this division . . . , the commissioner may in the commissioner's discretion bring an action in the name of the people of the State of California in the superior court to enjoin the acts or practices . . . ." Subdivision (b) provides, "If the commissioner determines it is in the public interest, the commissioner

may include in any action authorized by subdivision (a) a claim for ancillary relief, including but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action, and the court shall have jurisdiction to award additional relief." In addition, "Any person who violates any provision of this law . . . shall be liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the commissioner in any court of competent jurisdiction." (Corp. Code, § 25535, subd. (a).)

"The civil, criminal, and administrative remedies available to the commissioner pursuant to this division are not exclusive, and may be sought and employed in any combination deemed advisable by the commissioner to enforce the provisions of this division." (Corp. Code, § 25255.) There are, however, different requirements which apply to each type of enforcement. For example, as noted above, a criminal prosecution requires a willful violation. A defendant civilly sued for misleading statements in the sale of securities may rely on the affirmative defense that the plaintiff knew the true facts or that the defendant exercised reasonable care and did not know of the untruth. (Corp. Code, § 25501.) This defense does not apply, however, in an administrative enforcement action brought by the Commissioner seeking to enjoin further sales based on false or misleading statements. (*People v. Simon*, *supra*, 9 Cal.4th at pp. 515-516.)

Thus, care must be taken not to import requirements for a criminal prosecution or civil suit into this administrative enforcement action.

2. *Privity Is Not Required for an Administrative Enforcement Action*

Relying on *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, defendant argues that he cannot be held liable in an administrative enforcement action for violating the Corporate Securities Law of 1968 unless he was in privity with the investors. That case involved investors who sued a broker-dealer who placed worthless bridge notes with them. The investors brought suit under Corporations Code section 25501, which provides that a civil action may be brought *against* anyone who violates Corporations Code section 25401 (offering or selling a security by means of untrue or misleading statements). (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC, supra,* 158 Cal.App.4th at pp. 232-233, 252-253.) Yet the plain language of Corporations Code 25501 provides that any person who violates Corporations Code section 25401 "shall be liable to the person who purchases a security from him." The statute, by its terms, limits recovery to plaintiffs who purchased the security from the defendant. It does not provide for civil liability of a broker-dealer who acted as a placement agent for the seller, but did not actually sell the security to the plaintiffs.[30] As such, the appellate court concluded that the broker-dealer could not be liable under Corporations Code section 25501 to the investors. (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC, supra,* 158 Cal.App.4th at p. 253.)

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[30] Additionally, the statute does not provide for civil liability to a person who was offered a security based on a false representation, but chose not to purchase it.

That privity is expressly required for a civil suit under Corporations Code section 25501 has no bearing on this case, which is an administrative action brought under Corporations Code section 25530. The privity requirement is found in the civil enforcement provision, not the administrative enforcement provision or the substantive provisions violated. The administrative enforcement provision has no such privity requirement. The Commissioner may bring an administrative action seeking injunctive relief "[w]henever it appears to the commissioner that any person has engaged or is about to engage in any act or practice considered a violation" of the Corporate Securities Law of 1968. (Corp. Code, § 25530, subd. (a).) Moreover, there is no privity requirement when the Commissioner seeks restitution. The Commissioner may seek restitution "on behalf of the persons injured by the act or practice constituting the subject matter of the action." (Corp. Code, § 25530, subd. (b).) There is no limitation that the Commissioner may seek restitution only on behalf of those who were in privity with the violator; the Commissioner may seek restitution on behalf of any "person[] injured" by the violation.[31]

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[31] Defendant suggests that the Commissioner should not be allowed to obtain relief beyond that which could be obtained by a private plaintiff, but can point to no authority requiring such a limitation. Indeed, Corporations Code section 25530, subdivision (b) allows the Commissioner to obtain *disgorgement* on behalf of the parties injured, while none of the civil action provisions provide for that remedy. Similarly, $25,000 civil penalties can *only* be recovered in enforcement actions brought by the Commissioner. (Corp. Code, § 25535.)

3. *Defendant Directly Offered or Sold the PIAs to Eight of the Nine Investors*

Defendant next contends that the trial court improperly found that he violated securities laws as a principal in LadyCare or by giving substantial assistance to Cole. Yet when defendant raised his substantial assistance argument in an objection to the proposed statement of decision, the trial court expressly indicated that defendant had *directly* sold and offered the securities. As to eight of the nine investors, the evidence supports the trial court's conclusion.

Defendant relies on the fact that he was not named as a party to the PIAs, which expressly stated that they were between Cole and the investors. But defendant overlooks the fact that five of the investors (Canns, Browns, Hadrick, Grayson, and Stoute) made their checks out to defendant. Defendant did not receive these funds as a third-party beneficiary of the PIAs between Cole and the investors. Instead, he received them because he was the individual responsible for the finances of the LadyCare business, the PIAs were investments in that business, and the investors were told that defendant was the person to whom their investments should be given under the PIAs. Defendant understood that the funds he was receiving were investments in the LadyCare business,[32] and knew that, under the terms of the investments, he had a duty to properly invest the funds in LadyCare. In short, the fact that defendant did not sign

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[32] Defendant testified that Cole had the investors make their checks out to defendant in order to repay defendant for money that he had loaned Cole. This testimony is refuted by the document defendant prepared setting forth the allocation of "[Stoute]'s $20,000 Investment." Had defendant believed Stoute's $20,000 check to him was a repayment of the money he had loaned Cole, he would not have allocated it to LadyCare expenses, and he surely would not have called it an "[i]nvestment."

the PIAs did not prevent him from selling the securities when he is the individual who received the investment funds.[33]

As to Reed, the Belisles and the Cofields, while defendant might not have "sold" them the investments, there is sufficient evidence that he *offered* the investment to them. An offer "includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." (Corp. Code, § 25017, subd. (b).) Although Reed first heard about the LadyCare investment opportunity from her daughter, she then discussed it with defendant, who apparently set up the meeting with Cole where Reed signed the PIA. This is sufficient evidence that defendant solicited Reed's investment. Yolanda Belisle directly testified that defendant approached her at church and asked if she was interested in his investment opportunity. Defendant told the Cofields about LadyCare, and first told them it was closed to new investors. He then telephoned and said the opportunity was still available. These acts clearly constitute offers to sell securities.

The conclusion is different with respect to the ninth investor, the Wards. Defendant was not involved in the offer of the security to the Wards, nor was he involved in the sale by receiving the funds. The Wards' check was written to Cole's wife, and there is no evidence that the check was eventually given to defendant to use in

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[33] As defendant directly sold the securities to these five investors, even if privity were required for an order of restitution in an administrative action, we would conclude that privity was established. Indeed, defendant is clearly a proper party to be ordered to return these investors' funds as the investors gave the funds to defendant.

the LadyCare business.[34] The trial court expressly found defendant responsible for violating the securities laws on a theory of direct liability, and therefore did not reach issues of indirect liability. As there is no evidence that defendant directly offered or sold the security to the Wards, we must remand for a further determination of whether defendant offered or sold the investment to the Wards as a principal in LadyCare or on a theory of substantial assistance.[35]

4. *The Private Security Exemption Does Not Apply*

Defendant next argues that he did not "offer or sell" any unqualified or non-exempt securities, because each PIA was exempt from qualification under the private security exemption. There are four elements to the private security exemption: (1) sales made to no more than 35 persons; (2) all purchasers have a preexisting relationship with the offerors or could reasonably be assumed to have the capacity to protect their own interests; (3) all purchasers represent that they are purchasing for their own accounts; and (4) the offer or sale is not accomplished by advertisements. There is no dispute regarding the first, third,[36] and fourth elements; we are concerned here with the preexisting relationship requirement.[37]

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[34] The only such evidence is Cole's general statement, which the trial court obviously disbelieved, that he never commingled funds and all of the investors' money was spent on LadyCare.

[35] The same would be true with respect to defendant's liability for Cole's fraud in the sale of the security to the Wards.

[36] We are somewhat concerned regarding the third element, that each purchaser represents that the purchaser is purchasing for the purchaser's own account, given the language in the PIAs which states, "This Company makes it possible for certain

The relevant statutory language requires: "All purchasers . . . have a preexisting personal or business relationship with the offeror or any of its partners, officers, directors or controlling persons, or managers . . . ."

"[T]he main objective of the securities law is to protect the public against the imposition of insubstantial, unlawful and fraudulent stock and investment schemes [citations], and to promote full disclosure of all information that is necessary to make informed and intelligent investment decisions [citations]." (*People v. Park* (1978) 87 Cal.App.3d 550, 565.) As such, the relationship contemplated by the exemption is a relationship " 'consisting of personal or business contacts of a nature and duration such as would enable a reasonably prudent purchaser to be aware of the character, business acumen and general business and financial circumstances of the person with whom such relationship exists.' " (*People v. Simon, supra*, 9 Cal.4th at p. 502, fn. 8.) The relationship "contemplates more than mere acquaintance." (*Ibid.*) The relationship "must be one of sufficient duration and nature that the offeror of a security has reason to believe the investor is able to assess the issuer's honesty and competence." (*Ibid.*) "Whether a prior relationship warranting reliance on the seller of an unregistered security exists is an objective test and looks to what a reasonably prudent investor would be aware of about the offeror from the prior personal or business relationship.

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members of a particular, but private, sector to invest by offering a limited short-term investment opportunity through personal representative." However, the Commissioner did not pursue this argument at trial and does not pursue it on appeal.

[37] There is no suggestion in the record before us that the investors were experienced enough to protect their own interests.

This test is intended to protect investors by placing on the offeror the burden of establishing that the nature and duration of the relationship is one that would enable a reasonably prudent investor to assess the general business and financial circumstances of the issuer." (*Id.* at pp. 502-503, fn. 8.)

Defendant argues that the undisputed evidence establishes that each investor had a preexisting personal or business relationship with him or Cole that would satisfy the exemption. We disagree. While the testimony of Cole or defendant might be sufficient to give rise to the inference of such a relationship, the testimony of the investors constituted a sufficient basis for the trial court's conclusion to the contrary. We briefly discuss each investor:[38]

While Reed had known defendant for many years, she had lost touch with him and only recently realized that he was the same person she had known before. Her testimony that they "just kind of remained friends" establishes a relationship which is not of the sort that would enable a reasonably prudent investor to assess the general business and financial circumstances of defendant.

Yolanda Belisle only knew defendant because she was a greeter at church. That she believed defendant "seemed like a nice man," shows only mere acquaintanceship,

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[38] The private security exemption requires that "[a]ll purchasers" have the necessary relationship with the offeror. It may be that if a single purchaser lacks the required relationship, the private exemption therefore does not apply. The question appears to be an open one. (See *People v. Simon, supra,* 9 Cal.4th at p. 500, fn. 6.) The Commissioner does not pursue this argument on appeal, and, given our conclusion that the relationship did not exist with any LadyCare investors at issue in this case, we need not reach it.

not a relationship of sufficient duration and nature that defendant had reason to believe the Belisles were able to assess his honesty and competence.

The Cofields apparently trusted defendant because he gave a financial seminar at church. That defendant had his church's imprimatur is no substitute for a longstanding personal relationship which would enable the Cofields to assess defendant's honesty and business competence. Defendant also relies on the fact that Cole had refinanced the Cofields' home some time before the Cofields' investment. That the Cofields once used Cole to refinance a mortgage is insufficient to enable the Cofields to assess Cole's general business and financial circumstances.

The Canns had no relationship with defendant beyond belonging to the same church. Clearly, all members of the same church do not, as a matter of law, have the necessary personal relationship with each other to establish the private security exemption. Although Samuel Cann knew Cole and had stayed at Cole's house, he expressly testified that he knew nothing of Cole's business character or his track record in business. This is sufficient to defeat the personal relationship exemption.

The Browns had no prior relationship with defendant. The Browns used Cole, after an introduction from Leroy Cofield, to refinance their home. Cole then convinced them to invest the proceeds from the refinance in LadyCare. As we stated above, that Cole refinanced a mortgage for an investor does not establish a relationship sufficient for the investor to assess Cole's general business and financial circumstances. This is

even more true where Cole performed the refinance as part of a single transaction in which he convinced the investor to invest the proceeds in LadyCare.

Betty Hadrick's sole relationship with defendant and Cole was that she used defendant to refinance her home through Cole's company -- the same transaction in which defendant and Cole then convinced her to invest the proceeds in LadyCare. This is not sufficient to establish a personal relationship of sufficient duration to enable Hadrick to be aware of the character, business acumen, and general business and financial circumstances of defendant and Cole.

Grayson knew defendant from church and considered him a friend; as discussed above, this is insufficient to establish the necessary relationship. Grayson met Cole when he refinanced her home and convinced her to invest the proceeds. This, too, is insufficient.

Petra Stoute specifically testified that she knew nothing about the character of defendant or Cole as related to business. She met them when Cole refinanced her home and defendant helped; during that same transaction, she was convinced to invest. As with the other investors, this evidence shows a relationship which is not strong enough to establish the statutory exemption.

Finally, the Wards testified to no pre-existing relationship with defendant or Cole.[39] They first met Cole at church; he invited them to his office and solicited them as investors. While Cole testified to a greater relationship with the Wards,

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[39] Lawrence Ward was involved in another investment with Cole; Phyllis Ward testified that the LadyCare investment predated the other.

Phyllis Ward's testimony was to the contrary, and the trial court was free to accept Phyllis Ward's testimony over Cole's.[40]

In sum, the testimony of each investor was sufficient to support the trial court's conclusion that each of the nine investors did not have a personal or business relationship with defendant or Cole such as would enable a reasonably prudent purchaser to be aware of the character, business acumen, and general business and financial circumstances of the person with whom such relationship existed. As such, the trial court did not err in finding that the sales were not exempt, and therefore, that defendant violated Corporations Code section 25110.

5. *Fraud*

Defendant was enjoined from committing further violations of securities laws, required to pay restitution to the nine investors, and assessed nine civil penalties. It is apparent that the injunction against the further sale of unqualified non-exempt securities, order of restitution, and imposition of civil penalties can all be supported by the finding that defendant violated Corporations Code section 25110. Therefore, we need not reach defendant's remaining contentions.

To the extent defendant must have committed at least one act of fraud in the sale of securities in order to support the trial court's order enjoining him from further

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[40] Specifically, Cole testified that: (1) He met the Wards in 2000; (2) The Wards were his friends; (3) Lawrence Ward had a key to Cole's office because Cole permitted Lawrence Ward to put his real estate license under Cole's wife's license; and (4) Cole and his wife took in the Wards because they were in a bad way. In contrast, Phyllis Ward testified that she first met Cole in July 2004 and that her husband was a retired truck driver.

violations of Corporations Code section 25401, we conclude defendant's conduct with respect to Hadrick's investment is sufficient. In early August 2004, defendant promised Hadrick the quick return of her investment and a "sure" profit if she invested in LadyCare. He told her LadyCare was "very successful" in Canada. At this point in time, LadyCare had been on sale in Vancouver since June 1, 2004, and had, in the two months in which it was on sale, sold a grand total of seven units. Defendant also knew, by this time, that earlier investors had not been paid back as promised, and surely had not received their promised 100% return. Indeed, defendant made these representations to Hadrick some six months after he had written, on a financial statement, "WE ARE GETTING FAR BEHIND," and the sale of *less than ten LadyCare units in two months* could not possibly have given him cause to believe that the LadyCare venture was now successful. Thus, defendant obtained Hadrick's checks based on false representations which he had to have known were false. Defendant committed fraud in the sale of securities, and was properly enjoined from further doing so.

6. *Restitution and Civil Penalties*

The trial court calculated restitution at $202,000, as the amounts invested by the nine investors at issue in this case. There appears to have been an error in the court's addition.[41] We set forth the proper restitution calculation:

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[41] The trial court did not set forth the basis of its calculations, nor does the Commissioner, who argues on appeal that the actual total invested by the nine investors was $208,000. It appears that they may have included a total $41,000 invested by defendant's family members and close friends who did not testify. Yet the trial court's statement of decision appears to hold defendant responsible only for the investments of the nine investors who testified. Indeed, the Commissioner concedes the point. It

Investor	Amount Invested	Amound Refunded	Restitution Due
Reed	$2,500	0	$2,500
Belisles	$15,000	$15,000	0
Cofields	$10,000	0	$10,000
Canns	$10,000	$1,500	$8,500
Browns	$25,000	0	$25,000
Hadrick	$30,000	0	$30,000
Grayson	$15,000	0	$15,000
Stoute	$35,000	0	$35,000
Wards	$25,000	0	$25,000
		Total:	$151,000

The calculation above assumes that the Wards' investment is properly subject to restitution; this is only true if the Wards were injured by defendant's violations of the Corporate Securities Law, a matter to be determined by the trial court on remand. In the absence of liability for the Wards' investment, the total restitution owed is $126,000.

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appears that the investments of these five additional investors would fall under the private security exemption. Thus, if the trial court were to award restitution to these five investors, it would be based on the conclusion that defendant made false representations to them (even though they did not testify) or that a security which is not subject to the private exemption with respect to any one investor fails to be exempt for all investors. The trial court's statement of decision does not indicate that its decision rested on either basis.

The trial court also awarded nine civil penalties, one for each investor. In the absence of a violation of securities law with respect to the Wards' investment, no civil penalty can be imposed on defendant with respect to their investment.[42]

DISPOSITION

The restitution order is modified to require restitution in the amount of $126,000. The imposition of civil penalties is modified to impose eight $25,000 civil penalties, in the total amount of $200,000. As modified, the judgment is affirmed. The matter is remanded to the trial court for further findings of fact with respect to the Wards' investment; and any additional restitution award and/or civil penalty based on those findings. The parties shall bear their own costs on appeal.

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J. ALDRICH, J.

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[42] The Commissioner correctly notes that the trial court could have imposed two civil penalties per investor, one for the violation of Corporations Code section 25110 and one for the violation of Corporations Code section 25401. While the trial court could have done so, it is clear that the court exercised its discretion to impose a single penalty per investor. We will not uphold the ninth civil penalty (imposed with respect to the Wards) as a second penalty based on defendant's conduct with respect to one of the other investors, when it is apparent that the trial court concluded that one penalty per investor was sufficient.