

PPB



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
MARKET REGULATION

June 11, 2007

Ms. Patricia Hall
Managing Director
Hallmark Capital Corporation
230 Park Avenue, Suite 2430
New York, NY 10169

Re: Hallmark Capital Corporation

Dear Ms. Hall:

This is in response to your letter dated February 26, 2007. As an initial matter, we note that the staff of the Division of Market Regulation, as a matter of policy, does not provide advice regarding ongoing activity.

Nonetheless, based on the general descriptions of the activities included in your letter, it appears that Hallmark Capital Corporation ("HallCap") would be required to register with the Commission as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934. For additional information, you may wish to refer to the Division of Market Regulation's "Guide to Broker-Dealer Registration," posted on the Commission's website at <http://www.sec.gov/divisions/marketreg/bdguide.htm>, and to the staff's letter to Country Business, Inc., dated November 8, 2006, at <http://www.sec.gov/divisions/marketreg/mr-noaction/cbi110806.htm>. You may also wish to refer to the American Bar Association's publication, Report and Recommendations of the Task Force on Private Placement Broker-Dealers, published in The Business Lawyer in May 2005.¹

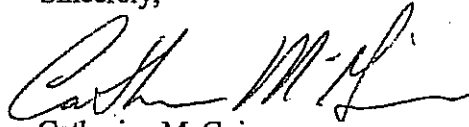
We express no view with respect to other questions HallCap's activities may raise, including the applicability of any other provision of the federal securities laws, any state law, or any self-regulatory organization rules. Before continuing with the activities described in your letter, you should consult with private counsel familiar with the federal securities laws to obtain legal advice as

¹ The staff expresses no view on this publication, citing it solely as one example of private counsels' views.

Ms. Patricia Hall
June 11, 2007
Page 2

to how the above issues should be resolved in your particular circumstances. Private counsel would be in a position to advise you on the basis of a more thorough understanding of your activities.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine McGuire". The signature is fluid and cursive, with a long horizontal stroke at the end.

Catherine McGuire
Chief Counsel

Hallmark Capital Corporation

230 Park Avenue Suite 2430

New York, NY 10169

(212) 661-4141

SECURITIES AND EXCHANGE COMMISSION

RECEIVED

FEB 27 2007

COPY
#7

DIVISION OF MARKET REGULATION

Securities Exchange Act of 1934

Section 15

February 26, 2007

Catherine McGuire, Esq.
Chief Counsel and Associate Director
Division of Market Regulation
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Office of Chief Counsel

MAR 08 2007

Division of Market Regulation

Re: Request for No Action Letter – Finder Activities

Dear Ms. McGuire:

With regards to Hallmark Capital Corporation, a Delaware Corporation (“HallCap”), we request assurance that the staff of the Division of Market Regulation (the “Staff”) of the Securities and Exchange Commission (the “Commission”) will not recommend enforcement action to the Commission under Section 15(a) of the Securities and Exchange Act of 1934 (the “Exchange Act”) for HallCap’s engagement in the activities described in this letter without registering as a broker-dealer pursuant to Section 15(b) of the Exchange Act.

Background: HallCap

HallCap is a financial consultant and finder for small businesses that assists the owners of businesses in raising capital, facilitates mergers and acquisitions and provides strategic business consulting services. Before the commencement of any assignment, HallCap informs the client that it is not a broker-dealer. HallCap does not act as an agent for the client company and does not effectuate transactions for the account of others. At no point does HallCap offer to sell securities to or solicit investment funds from the general investing public.

Assistance in Raising Capital

HallCap assists small businesses with revenues under \$25 million with their debt and equity capital needs. In the case of equity capital, HallCap assists the client company by preparing a confidential information summary describing the business, identifying broker-dealer firms that might be interested in working with the company and arranging meetings leading to an engagement of the broker-dealer by the client company to raise capital. Once the broker-dealer is engaged, it has control of and oversight over all significant aspects of any securities transaction, including investor solicitation and execution of the transaction.

In the case of a client company's bank debt needs, HallCap identifies bank lenders that might have an interest in the client company's industry, prepares a confidential information summary describing the business, assists the client with the loan application process and arranges meetings leading to the extension of bank credit facilities to the client company.

HallCap is compensated with a modest upfront retainer and a fee based on the outcome of the transaction. The primary reason for this arrangement is to enable an otherwise financially-strapped small business client company to benefit from HallCap's services without having to pay for those services unless and until the assignment is successful and a transaction providing funds takes place. Due to the small size of the client company and its inability to attract small amounts of capital on its own, it often takes HallCap hundreds of hours of work over many months before a transaction is completed.

At no point does HallCap handle the securities or funds of others.

Assistance with Mergers and Acquisitions

HallCap assists small businesses with revenues under \$25 million with mergers and acquisitions. If a client company owner wants to sell his business, HallCap prepares a confidential information summary describing the business, identifies companies that might be interested in buying the client company, qualifies their interest in and ability to pay the owner's asking price and arranges exploratory meetings between the buyer and seller. If serious interest is expressed by the buyer and accepted by the seller, the client company's attorney spearheads any negotiations leading to definitive agreements and the execution of a transaction.

If a client company is interested in acquisitions, HallCap and the client company identify possible acquisition targets. HallCap conducts preliminary information gathering interviews, which include a discussion of the proposed asking price/terms, and prepares an acquisition profile on the target company for the purpose of preliminary screening, i.e., determining if the client company is interested in taking a serious look at the possible acquisition target given the expected asking price/terms. If the client company is seriously interested in pursuing the acquisition target after this preliminary screening process, the client company's legal counsel spearheads any negotiations leading to definitive agreements and the execution of a transaction. All merger and acquisition transactions involve a single buyer.

HallCap is compensated with a modest upfront retainer and a fee based on the outcome of the transaction. The primary reason for this arrangement is to enable an otherwise financially-strapped small business client company to benefit from HallCap's services without having to pay for those services unless and until the assignment is completed, which is under the control of, and at the sole discretion of, the client company. HallCap often provides hundreds of hours of work over many months before a transaction is completed.

At no point does HallCap act as agent for the client company, effectuate transactions for the account of others, handle the securities or funds of others, or bind either party to the transaction. Rather, HallCap plays the role of a consultant bringing to bear its knowledge and expertise to identify and evaluate merger and acquisition targets.

Strategic Business Consulting Services

HallCap assists both small businesses with revenues under \$25 million, as well as larger corporate clients including Fortune 500 firms, with strategic business consulting services intended to advance the client company's overall business and strategic objectives. Services include strategic planning, advice with respect to business and management issues, and assistance with formulating and implementing corporate marketing and general public relations strategies.

HallCap is compensated with pre-negotiated fixed fees paid over the term of the engagement. At no point is HallCap involved in effectuating transactions for the account of others.

Request for No Action

In summary, HallCap does not engage in the activities of a broker-dealer, does not effectuate transactions for the account of others, does not take a central role in the negotiations leading to a completed transaction, does not act as an agent on behalf of the client company and does not solicit investment funds from the general public. HallCap does receive transaction-based compensation, but the primary reason for this arrangement is to enable the small company client to afford to retain the services of HallCap without any obligation to close on a transaction. Absent this arrangement, the small business owners we serve would be unable retain the professional services that would enable them to be successful in raising capital and in mergers and acquisitions.

HallCap acts as a finder and plays a very limited role in the execution of a transaction once the preliminary exploratory process has been completed and the parties have expressed serious interest in pursuing a possible transaction.

We do not believe that a regulatory problem exists, but on occasion, we are questioned about the possible need for regulatory oversight, including registration as a broker-dealer, an action that we do not believe is necessary given the limited scope of our activities.

We respectfully request that the Staff confirm that it will not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act for HallCap's engagement in the activities described in this letter without registering as a broker-dealer pursuant to Section 15(b) of the Exchange Act.

Sincerely,

Patricia Hall
Managing Director

[Proposed Amendment of the California Corporate Securities Law, by adding a new section to Division 1, Part 3, Chapter 2]:

§25211.1, Certificate Required for a Private Placement Broker/Dealer.

- (a) Unless exempted under the provisions of Chapter 1 (commencing with §25200) of this part, no person shall effect any transaction in, or induce or attempt to act as a private placement agent for, an issuer in this state unless the person has first applied for and secured from the Commissioner a certificate authorizing that person to act in such capacity, provided that such person meets both of the following conditions:
 - (i) Such person intends to engage only in the following brokerage activities: Acting as private placement agent for a corporation, limited liability company, limited partnership or other entity offering securities in a private placement exempt from registration requirements of the Securities Act of 1933; and
 - (ii) Such person is exempt from registration as a broker/dealer under §15(a) of the Securities Exchange Act of 1934 by reason that the business of such broker or dealer is exclusively intrastate and such broker/dealer does not make use of any facility of a national securities exchange.
- (b) No person shall, on behalf of a private placement broker/dealer licensed pursuant to this section, or on behalf of an issuer, effect any transaction in, or attempt to induce the purchase or sale of, any security in this state unless that broker/dealer and agent have complied with any rules that the Commissioner may adopt for the qualification and employment of such agents.
- (c) The application for a certificate as a private placement broker/dealer shall be accompanied by a consent to service of process specified in §25240 and shall contain such information in such detail relating to the applicant and any persons associated with it as the Commissioner may by rule require.

TITLE 10, CALIFORNIA CODE OF REGULATIONS

Chapter 3, Commissioner of Corporations

Subchapter 2, Corporate Securities

Article 8, Licensing of Broker-Dealers and Agents

§260.211.4, Application for License; Private Placement
Broker-Dealer Certificate

(a) For an application for registration as a private placement broker-dealer (PPBD) licensed pursuant to §25211.1 of the Code, and any amendment to such application, shall be filed on Form PPBD (Uniform Application for Private Placement Broker-Dealer Registration) in accordance with the form instructions and by filing the form directly with the Commissioner at the Department of Corporations. In addition to the Form PPBD, the application shall include the additional documentation prescribed in Subsections ___ through ___ of this rule.

Applicant may use this form to apply for a certificate as a PPBD only if Applicant meets all of the conditions in §25211.1 of the Code.

(b) Application on Form PPBD.

1. Applicant must answer all questions on the Form (except Item 11, which is optional). Applicant can type the answers or write in the answers neatly in black or blue ink. Do not use pencil.
2. Applicant must file all exhibits mentioned in Item 12 of this Form.
3. Applicant must send a check with this Form to cover all applicable filing fees. The fees are:
 - \$ _____ for the Applicant
 - \$ ___ for each Form ___ to register an individual. If the Applicant is an individual, he or she must complete both a Form PPBD and a Form ___.
 - \$ ___ for processing the fingerprint card of each individual for whom a Form ___ is being filed. Individuals who are not being registered may also need to be fingerprinted. Consult the Department of Corporations if you need advice about fingerprint requirements.

4. When Applicant has completed this form, send it with ALL of the Exhibits listed in Item 12 of this Form to the Department of Corporations Office in which the Applicant's principal place of business is located.

FORM PPBD

1. Identification of the Applicant

Name of Applicant: _____

NOTE: If the business will be conducted by an individual as a sole proprietorship, with or without other employees, give the name of the sole proprietor. If the business will be conducted by an entity (corporation, partnership, LLC, or other) give the name of the entity; in this case the entity is the "Applicant."

Address of Applicant: _____

Type of Entity: _____

Executive Representative: _____

Telephone number: _____

Fax number: _____

2. Identification of People Who Will Be Working for the Applicant

List the names of all individuals who will be involved on behalf of the Applicant in structuring private placements, communicating with prospective investors or otherwise engaged in the management or operation of the Applicant's business as a PPBD.

- Indicate which of these individuals will have Executive Responsibility for the business of the Applicant. "Executive Responsibility" means authority to sign contracts or make binding decisions for the Applicant.
- Indicate which of these individuals will have Supervisory Responsibility within the Applicant. "Supervisory Responsibility" means the duty of training other workers and reviewing and checking their work to be sure that it complies with all applicable laws and rules and with the internal policies of the Applicant.

If Applicant needs more space, attach additional page(s) marked Rider 2.

<u>Name</u>	<u>Social Security No.</u>	<u>Executive/ Supervisory?</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

3. Executive and Supervisory Personnel

For each individual identified in Item 2, as an Executive or Supervisory person, give a brief statement of what his/her duties and authority will be. Also give a brief statement of the experience that you think qualifies each Executive or Supervisory person for his/her assignment. Attach additional pages as Rider 3 if necessary.

Chief Executive: _____
Chief Compliance Officer: _____
Chief Financial Officer: _____
Other key personnel: _____

4. Types of Securities to Be Offered and Sold

Check the boxes below to indicate what kinds of securities the Applicant intends to sell. Check all categories that describe the proposed business of the Applicant.

- Corporate stock
- Corporate debt securities
- Other corporate securities (explain on Rider 4)
- Limited partnership interests
- LLC interests
- Other securities (explain)

5. Types of Issuers

Give a brief description of the type of business(es) whose securities the Applicant intends to offer. For example, if the issuers will be in a manufacturing business, state the primary products manufactured. If the issuers will be in service businesses, state the types of services performed.

If you have identified any specific issuers for which Applicant intends to act as a private placement agent, give this information here, and attach any written agreements with those issuer(s) as Rider 5.

6. Types of Investors

Indicate what kinds of investors the Applicant expects to solicit and sell to.

- Institutional investors, i.e., organizations that have internal professional money managers and a net worth of at least \$2 million [?].
 - High-net-worth individuals, i.e., people who have personal net worth of at least \$1 million [?].
 - Individuals or entities that have a net worth of less than \$1 million.
 - Other (explain)
-
-

7. How Will the Applicant Locate Prospective Investors?

Check all applicable boxes.

- Prior business associates of the Applicant or its executives?
- Social contacts of the Applicant or its executives?
- Relatives of the Applicant or its executives?
- Prospects whose names will be supplied by the issuer?
- Prospects whose names will be supplied by other sources? (If this box is checked, state what other sources will be used.) _____
- Prospects obtained via the Internet? Reminder: USE OF THE INTERNET MAY RESULT IN LOSS OF PRIVATE PLACEMENT STATUS.

8. Recordkeeping

Describe the Applicant's proposed recordkeeping system.

- Financial books and records will be kept on a computer. (If so, state what kind of software will be used.)
- Financial books and records will be kept manually.
- Applicant will use the services of an outside accountant or service bureau to help it keep financial records. (If so, identify the service provider(s) and attach a copy of any written agreement with them).

9. Professional Counsel

Give the name of any legal counsel or other consultant the Applicant has retained (or expects to retain) to advise it about registration as a PPBD or its proposed business as a PPBD.

Name of adviser: _____
Name of firm: _____
Address: _____

10. No Disqualification

The Applicant certifies that neither the Applicant, nor any of Applicant's predecessors, any affiliated Applicant, any of the Applicant's directors, officers, general partners, beneficial owners of 10 percent or more of any class of its equity securities, any of the Applicant's promoters presently connected with the Applicant in any capacity, any underwriter of the securities to be offered, or any partner, director, or officer of the underwriter meets any of the criteria described in Subdivisions (a)-(i) of Code §25212.

11. Other Information

Attached any other information or descriptive material that Applicant thinks is relevant to show that Applicant is qualified to conduct business as a PPBD. This item is OPTIONAL.

12. Exhibits

ALL of the Exhibits listed below must accompany Form PPBD when it is filed with the Department of Corporations.

Exhibit 1 Form PPBD. An original signed and notarized paper Form PPBD.

Exhibit 2 Form __. An original signed paper Form __ for each individual for whom PPBD registration is being requested, including the Applicant if the Applicant is an individual.¹

Exhibit 3 Fingerprints. An original fingerprint card for each person required to be fingerprinted.

Exhibit 4 Financial Statement. A balance sheet as of a date not more than 30 days before this form will be received by the Department of Corporations.

Exhibit 5 Income and Expense Projection. A projection of the Applicant's income and expenses from the securities business for the first 12 months of operation as a PPBD. This should be done on a month-by-month basis, with some explanation of the basis for each element of income and expense.

Exhibit 6 Written Supervisory Procedures. A copy of any internal procedures adopted by the Applicant for supervision of its personnel or for compliance with applicable laws and rules. If no procedures have been adopted, state this. This Exhibit is not required for any PPBD which proposes to have only one person for whom a Form __ is required to be submitted.

¹ The current practice for any PPBD application is that the Form __ is submitted electronically and filed after the application is accepted for the applicant.

[Proposed Amendment of the California Corporate Securities Law, by adding a new section to Division 1, Part 3, Chapter 2]:

§25211.2, Certificate Required for a Merger and Acquisition Specialist.

- (a) Unless exempted under the provisions of Chapter 1 (commencing with §25200) of this part, no person shall effect any transaction in, or induce or attempt to act as a merger and acquisition specialist ("M&A Specialist") in this state unless the person has first applied for and secured from the Commissioner a certificate authorizing that person to act in such capacity, provided that such person meets both of the following conditions:
 - (i) Such person intends to effect transactions in securities in this state only in connection with mergers, consolidations or purchases of corporate assets or stock, irrespective of whether the business being sold holds real property (provided the value of such property based on the selling company's most recent balance sheet constitutes less than 50% of the total assets being sold) and who does not receive, transmit or hold for customers any funds or securities in connection with such transactions; and
 - (ii) Such person is exempt from registration as a broker/dealer under §15(a) of the Securities Exchange Act of 1934 by reason that the business of such person is exclusively intrastate and does not make use of any facility of a national securities exchange.
- (b) No person shall, on behalf of an M&A Specialist licensed pursuant to this section, or on behalf of an issuer, effect any transaction described in Section (a)(i) above, unless that M&A Specialist and its agent have complied with any rules that the Commissioner may adopt for the qualification and employment of such agents.
- (c) The application for a certificate as a M&A Specialist shall be accompanied by a consent to service of process specified in §25240 and shall contain such information in such detail relating to the applicant and any persons associated with it as the Commissioner may by rule require.

TITLE 10, CALIFORNIA CODE OF REGULATIONS

Chapter 3, Commissioner of Corporations

Subchapter 2, Corporate Securities

Article 8, Licensing of Broker-Dealers and Agents

§260.211.4, Application for License: Merger and Acquisition Specialist

(a) For an application for registration as a merger and acquisition specialist (M&A Specialist) licensed pursuant to §25211.2 of the Code, and any amendment to such application, shall be filed on Form M&A Specialist (Uniform Application for M&A Specialist Registration) in accordance with the form instructions and by filing the form directly with the Commissioner at the Department of Corporations. In addition to the Form M&A Specialist, the application shall include the additional documentation prescribed in Subsections ___ through ___ of this rule.

Applicant may use this form to apply for a certificate as a M&A Specialist only if Applicant meets all of the conditions in §25211.2 of the Code.

(b) Application on Form M&A Specialist.

1. Applicant must answer all questions on the Form (except Item 11, which is optional). Applicant can type the answers or write in the answers neatly in black or blue ink. Do not use pencil.
2. Applicant must file all exhibits mentioned in Item 12 of this Form.
3. Applicant must send a check with this Form to cover all applicable filing fees. The fees are:
 - \$ _____ for the Applicant
 - \$ ___ for each Form ___ to register an individual. If the Applicant is an individual, he or she must complete both a Form M&A Specialist and a Form ___.
 - \$ ___ for processing the fingerprint card of each individual for whom a Form ___ is being filed. Individuals who are not being registered may also need to be fingerprinted. Consult the Department of Corporations if you need advice about fingerprint requirements.

4. When Applicant has completed this form, send it with ALL of the Exhibits listed in Item 12 of this Form to the Department of Corporations Office in which the Applicant's principal place of business is located.

FORM M&A SPECIALIST

1. Identification of the Applicant

Name of Applicant: _____

NOTE: If the business will be conducted by an individual as a sole proprietorship, with or without other employees, give the name of the sole proprietor. If the business will be conducted by an entity (corporation, partnership, LLC, or other) give the name of the entity; in this case the entity is the "Applicant."

Address of Applicant: _____

Type of Entity: _____

Executive Representative: _____

Telephone number: _____

Fax number: _____

2. Identification of People Who Will Be Working for the Applicant

List the names of all individuals who will be involved on behalf of the Applicant in structuring, communicating with prospective companies acquiring a business or being acquired or otherwise engaged in the management or operation of the Applicant's business as a M&A Specialist.

- Indicate which of these individuals will have Executive Responsibility for the business of the Applicant. "Executive Responsibility" means authority to sign contracts or make binding decisions for the Applicant.
- Indicate which of these individuals will have Supervisory Responsibility within the Applicant. "Supervisory Responsibility" means the duty of training other workers and reviewing and checking their work to be sure that it complies with all applicable laws and rules and with the internal policies of the Applicant.

If Applicant needs more space, attach additional page(s) marked Rider 2.

<u>Name</u>	<u>Social Security No.</u>	<u>Executive/ Supervisory?</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

3. Executive and Supervisory Personnel

For each individual identified in Item 2, as an Executive or Supervisory person, give a brief statement of what his/her duties and authority will be. Also give a brief statement of the experience that you think qualifies each Executive or Supervisory person for his/her assignment. Attach additional pages as Rider 3 if necessary.

Chief Executive: _____
Chief Compliance Officer: _____
Chief Financial Officer: _____
Other key personnel: _____

4. Types of Mergers and Acquisitions Applicant Intends to Pursue

Check the boxes below to indicate what kinds of M&A transactions in which the Applicant intends to engage. Check all categories that describe the proposed business of the Applicant.

- Corporate merger
- Sale of corporate stock
- Sale of corporate assets
- Joint Ventures
- Other corporate transactions (explain on Rider 4)

5. Types of Companies Acquiring or To Be Acquired

Give a brief description of the type of business(es) the acquisition of which who the Applicant intends to arrange.

If you have identified any specific companies for which Applicant intends to act as a M&A Specialist, give this information here, and attach any written agreements with those issuer(s) as Rider 5.

6. How Will the Applicant Locate Prospective M&A Opportunities?

Check all applicable boxes.

- Prior business associates of the Applicant or its executives?
- Social contacts of the Applicant or its executives?
- Relatives of the Applicant or its executives?
- Prospects whose names will be supplied by the issuer?
- Prospects whose names will be supplied by other sources? (If this box is checked, state what other sources will be used.) _____
- Prospects obtained via the Internet?

7. Recordkeeping

Describe the Applicant's proposed recordkeeping system.

- Financial books and records will be kept on a computer. (If so, state what kind of software will be used.)
- Financial books and records will be kept manually.
- Applicant will use the services of an outside accountant or service bureau to help it keep financial records. (If so, identify the service provider(s) and attach a copy of any written agreement with them).

8. Professional Counsel

Give the name of any legal counsel or other consultant the Applicant has retained (or expects to retain) to advise it about registration as a M&A Specialist or its proposed business as a M&A Specialist.

Name of adviser: _____
Name of firm: _____
Address: _____

9. No Disqualification

The Applicant certifies that neither the Applicant, nor any of Applicant's predecessors, any affiliated Applicant, any of the Applicant's directors, officers, general partners, beneficial owners of 10 percent or more of any class of its equity securities, any of the Applicant's promoters presently connected with the Applicant in any capacity, any underwriter of the securities to be offered, or any partner, director, or officer of the underwriter meets any of the criteria described in Subdivisions (a)-(i) of Code §25212.

10. Other Information

Attached any other information or descriptive material that Applicant thinks is relevant to show that Applicant is qualified to conduct business as a M&A Specialist. This item is OPTIONAL.

11. Exhibits

ALL of the Exhibits listed below must accompany Form M&A Specialist when it is filed with the Department of Corporations.

Exhibit 1 Form M&A Specialist. An original signed and notarized paper Form M&A Specialist.

Exhibit 2 Form __. An original signed paper Form __ for each individual for whom M&A Specialist registration is being requested, including the Applicant if the Applicant is an individual.¹

Exhibit 3 Fingerprints. An original fingerprint card for each person required to be fingerprinted.

Exhibit 4 Financial Statement. A balance sheet as of a date not more than 30 days before this form will be received by the Department of Corporations.

Exhibit 5 Income and Expense Projection. A projection of the Applicant's income and expenses from the securities business for the first 12 months of operation as a M&A Specialist. This should be done on a month-by-month basis, with some explanation of the basis for each element of income and expense.

Exhibit 6 **Written Supervisory Procedures.** A copy of any internal procedures adopted by the Applicant for supervision of its personnel or for compliance with applicable laws and rules. If no procedures have been adopted, state this. This Exhibit is not required for any M&A Specialist which proposes to have only one person for whom a Form ___ is required to be submitted.

¹ The current practice for any M&A Specialist application is that the Form ___ is submitted electronically and filed after the application is accepted for the applicant.

a lesser included offense under the accusatory pleading test.²

It follows that the court properly denied Marquez's request to instruct the jury on the crime of attempted grand theft auto.

DISPOSITION

The judgment is affirmed.

VOGEL, Acting P.J.

We concur: ROTHSCHILD, J., JACKSON, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Cite as 07 C.D.O.S. 7499

VINCENT SALAZAR, Plaintiff and Appellant,

v.

INTERLAND, INC., et al., Defendants and Respondents.

No. B189889

In the Court of Appeal of the State of California
Second Appellate District
Division Two

(Los Angeles County Super. Ct. No. BC311799)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jon M. Mayeda, Judge. Affirmed.

COUNSEL

Law Offices of James Aaron Pfister, Martin R. Berman and James Aaron Pfister for Plaintiff and Appellant.

Jones Day, Brian A. Sun, John S. Sasaki; Wargo & French, Joseph D. Wargo (Pro Hac Vice), Michael S. French (Pro Hac Vice); Graves Law Office and Phillip J. Graves for Defendants and Respondents.

Filed June 26, 2007.

OPINION

We affirm summary judgment in favor of respondents on appellant Vincent Salazar's claim for commissions on the transfer of Internet and Web-hosting services to respondents from AT&T Corporation. The trial court correctly found that the transaction was the sale of a business opportunity and that under Business and Professions Code section 10131, subdivision (a), Salazar was required to be licensed as a broker in order to recover commissions for arranging the sale or acquisition of this business.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint

Salazar, individually and doing business as Los Angeles Technology, sued respondents HostPro, Inc. (HostPro) and Interland, Inc. (Interland) for breach of contract and fraud. He alleged that he was an agent of AT&T Corp. (AT&T) authorized to market Internet and Web-hosting services to small and medium-sized businesses (the Web services). In 2001, he advised HostPro, which also provided Web services to small and medium businesses, that AT&T no longer wished to provide these Web services. HostPro expressed an interest in acquiring AT&T's small and medium business clients.

On February 13, 2001, Salazar entered into a written contract with HostPro to market HostPro's Web services to small and medium business customers and to arrange the acquisition of AT&T's small and medium business customers. HostPro represented to Salazar that he would receive a 10 percent commission on all monthly recurring fees received by HostPro up to \$10,000, a 20 percent commission on monthly recurring fees over \$10,000 and a 5 percent commission payment as a one-time setup fee for each customer acquired due to his efforts.

Based on the contract and representations, Salazar initiated and participated in meetings between HostPro and AT&T. HostPro merged its operations with Interland, which later acquired approximately 150,000 AT&T customers. Interland refused to pay Salazar his commission on the monthly recurring fees and his setup fees for the acquired AT&T customers. Salazar sued for damages in excess of \$20 million.

2. For the reasons stated in *Hopkins v. Reeves* (1998) 524 U.S. 88, and *People v. Birks*, *supra*, 19 Cal.4th at pages 116-136, we reject Marquez's suggestion that the instruction was required because carjacking and grand theft auto are "related" crimes.

Prior Federal Court Proceedings

Salazar originally filed a complaint in 2004 in federal district court, which was dismissed for lack of subject matter jurisdiction. Salazar refiled the complaint in Los Angeles Superior Court, but that case was removed to federal court based on diversity of citizenship. In support of its removal, Interland, a Minnesota corporation, and HostPro, originally a California corporation, represented that "[d]efendant... HostPro has no existence separate or apart from Defendant Interland." The district court eventually granted Interland's summary judgment motion as to the fraud but not the breach of contract cause of action. In March 2005, Interland again represented that Interland and HostPro were not separate entities. But after further briefing, the district court ruled that HostPro did have a separate corporate identity and had its principal place of business in Los Angeles, obviating diversity jurisdiction and requiring remand to the superior court.

Superior Court Proceedings

Upon remand, the parties briefed the issue of the effect in superior court of the prior federal court proceedings. In its briefing, Interland argued for the first time that Salazar could not recover under his contract because his lack of a business opportunity license rendered his contract for commissions illegal.

The trial court ruled that the district court's rulings on the previous summary judgment motions were void and ordered a further hearing on those motions based on the pleadings filed in federal court. The court granted leave to Interland to file an additional motion for summary judgment on the illegality issue. After a hearing, the trial court adopted as its own the order of the federal court granting summary judgment on the fraud claim and denying it as to the breach of contract claim. Later, the court granted summary adjudication on the breach of contract claim based on Salazar's lack of a broker's license. The minute order stated "After the subject transaction was completed, AT&T retained no assets, in the form of customer contracts, equipment, or otherwise, to continue with its small and medium sized Web-hosting business. The court finds that the subject transaction constitutes a sale of a 'business opportunity'..." The court entered judgment in favor of respondents from which Salazar has appealed.

DISCUSSION

I. CONTENTIONS ON APPEAL AND STANDARD OF REVIEW

Salazar contends that the trial court erred in finding that the transaction between Interland and AT&T constituted the purchase and sale of a "business opportunity" under Business and Professions Code section 10131, subdivision (a)¹ that required him to be licensed in order to recover under his contract. Specifically, Salazar argues that only a small portion of AT&T's assets were sold here and the decision in *All Points Traders, Inc. v. Barrington Associates* (1989) 211 Cal.App.3d 723 (*All Points*) requires the sale of all of the assets or stock of a corporation in order to constitute the sale of a "business opportunity." Salazar also challenges the order signed by the court on the grounds that it contains facts that were disputed.

We review the trial court's decision in granting summary judgment de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65.) In exercising de novo review, we "must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom ([Code Civ. Proc.] § 437c, subd. (c)), and must view such evidence [citations] and such inferences [citations], in the light most favorable

1. All further statutory references are to the Business and Professions Code unless otherwise indicated.

to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

II. SALAZAR WAS REQUIRED TO HAVE A BUSINESS OPPORTUNITY LICENSE

A. Business Opportunity License

In 1965, the Legislature merged the statute requiring a person acting as a business opportunity broker to be licensed with the section requiring a real estate broker to be licensed. (See *All Points, supra*, 211 Cal.App.3d at p. 728.) As a result, the definition of "real estate broker" in section 10131, subdivision (a) was expanded to include "a person who, for a compensation or in expectation of a compensation... does or negotiates to do one or more of the following acts for another or others: [¶] (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of... a business opportunity." Section 10130 requires a real estate broker to have a license. Sections 10130 and 10136 prohibit an unlicensed real estate broker from collecting compensation earned in the capacity of a broker. (*All Points, supra*, at p. 729.) To be licensed, a broker must meet training and experience qualifications. (§§ 10150.6, 10153.) "The purpose of these licensing requirements is to protect the public from incompetent or untrustworthy practitioners. [Citation.]" (*All Points, supra*, at p. 729.)

B. Definition of "Business Opportunity"

"Business opportunity" is defined as including "the sale or lease of the business and goodwill of an existing business enterprise or opportunity." (§ 10030.)

Salazar argues that the transaction between Interland and AT&T did not constitute a business opportunity because it did not involve the purchase and sale of all of the assets of AT&T, or one of its subsidiaries or divisions. He relies on a holding in *All Points* that "the sale or purchase of a 'business opportunity' encompasses any transfer of the ownership of an entire ongoing business in corporate form whether by transfer of all the stock or all the assets." (*All Points, supra*, 211 Cal.App.3d at p. 731.) But Salazar's reliance on *All Points* is misplaced because that case did not consider whether the transfer of less than all of a corporation's stock or assets can constitute the sale of a business opportunity. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["an opinion is not authority for a proposition not therein considered"].)

The issue analyzed in *All Points* was whether the licensing requirements of section 10131 applied to the sale of corporate stock, because a transfer of stock does not typically include a "vendible interest in the goodwill of the business carried on by the corporation." (*All Points, supra*, 211 Cal.App.3d at p. 732.) It was argued that a stock transaction could not also be the sale of a business opportunity. (*Ibid.*) But because all of the corporate stock was transferred in that case, the sale unquestionably also included "a transfer of the goodwill of the business, affecting the purchase price." (*Ibid.*) "[T]he purchaser of the corporation not only acquired the 'business' but the 'goodwill' as well." (*Ibid.*) The *All Points* court held that the transfer of all of the corporate stock constituted the transfer of the business and a license was required to broker such a sale. But we do not read *All Points* as requiring the transfer of all of the shares or assets of a corporation, or of one of its subsidiaries or divisions, in order for a transaction to have constituted the sale of a business opportunity.

"Business opportunity" is defined to "include the sale or lease of the business and goodwill of an existing business enterprise or opportunity." (§ 10030.) There is no requirement that the sale include every business in which a corporation is engaged. Moreover, by using the term "include" the definition is not necessarily limited to the inclusions.

(*People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414, citing *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774.) The plain language of the statute, therefore, does not support Salazar's contention that nothing short of the transfer of all the stock or assets of AT&T, or of one of its subsidiaries or divisions, could constitute the sale of a business opportunity.

Nor are there any cases that support Salazar's position. Salazar acknowledges that the sale of a business has been defined as the sale of those assets essential to the continuation of a business. (*Shaw v. Hollister Land etc. Co.* (1913) 166 Cal. 257, 259 (*Shaw*)). In *Shaw*, a corporation in the business of conducting races could sell its sole asset, a race-track, without shareholder approval because sale of that property did not prevent the corporation from conducting future races on other property, such as leased property.² (*Shaw, supra*, at pp. 260–261; in accord, *Bradford v. Sunset Land etc. Co.* (1916) 30 Cal.App. 87; *Estate of McCarthy* (1932) 127 Cal.App. 80; *Piedmont Publishing Co. v. Rogers* (1961) 193 Cal.App.2d 171.) Furthermore, the term "business" does not necessarily include all of the assets or property of an ongoing enterprise. (*Estate of Friedrichs* (1930) 107 Cal.App. 142, 144 ["[b]usiness is not a technical word and has no definite, popular or legal meaning"].) The question before us is not how many assets were sold but whether the business was capable of continuing after the sale.

The sale of a business opportunity includes the transfer of goodwill. (§ 10030) "Goodwill" is defined as the "expectation of continued public patronage." (§ 14100.) "[I]t is the probability that the old customers will resort to the old place. It is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in." [Citations.] (*In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090, 1098, fn. 6.)

The transfer of a business opportunity as defined in section 10030 includes the transfer of those assets so essential that a business cannot continue without them and the transfer of future patronage or customers. As discussed below, we find undisputed proof of those attributes in the transaction between AT&T and Interland.

C. The AT&T/Interland Transaction

The transaction between AT&T and Interland was detailed in the asset purchase agreement (Agreement) between the two companies. The Agreement described AT&T as "engaged, among other things, in the business of providing certain 'low-end' Web-hosting services known as AT&T Small Business Hosting Service (the 'Shared Service') and AT&T Business Ready Dedicated Hosting Service (the 'Dedicated Service'); together with the Shared Service, the 'Services') to certain of its business customers..." The Agreement recited generally that the parties desired to sell and purchase "certain of the assets relating to the Services..." The Agreement then delineated the specific assets transferred from AT&T to Interland, which included AT&T's customer contracts for the "Services," other enumerated contracts and license agreements applicable to the "Services" and "[a]ll of Seller's right, title and interest in and to all of the Dedicated Service Exclusive Equipment..." "Dedicated Service Exclusive Equipment" was equipment owned by AT&T on the closing date used exclusively to conduct the dedicated "Services" as defined in the recitals. AT&T also agreed not to solicit the services customers for six months. Interland, in turn, assumed all obligations under the customer contracts and paid AT&T more than \$5 million for the transfer.

2. Former Civil Code section 361a required shareholder approval of any "conveyance of the business... as a whole, of any corporation..."

Salazar proffered no evidence that AT&T could or did continue offering the "Services" after it had transferred all of the equipment it used to conduct the "Services" and all of its customer contracts under which it had previously provided the "Services."³ Instead, Salazar relied on a press release issued by Interland that did not mention the sale of units, divisions or the entire assets of AT&T. The press release stated that Interland "acquired the small business-focused shared and dedicated Web-hosting assets of AT&T... , relating to AT&T Small Business Hosting Service and Business Ready Dedicated Hosting Service." Interland described its own business as providing "business-class Web-hosting services to small and medium businesses..." And AT&T stated that the sale "in no way diminishes the company's strong commitment to serving its small business customers in other market segments or the company's continued focus on hosting services for AT&T's mid-size and large business customers..." The press release indicated that both parties to the transaction viewed the hosting of Web services for small and medium businesses as a separate business from hosting those services for larger businesses and as separate from other types of services, for small and medium businesses. As such, the proffer of the release raised no issue of fact to support Salazar's position.

Salazar characterized the "Services" as a discrete business in his opposition to Interland's motion for summary judgment below. In his separate statement of undisputed material facts he stated: "AT&T decided that the servicing of its small to medium Web-hosting customers was not part of its long term strategy. [¶]... AT&T was seeking to concentrate only on large enterprise customers. [¶]... [¶] Salazar... wanted to bring... to HostPro the small to medium business Web-hosting business that AT&T desired to no longer service." (Italics added.) Furthermore, Salazar characterized AT&T's small to medium business customers as a "business opportunity" for HostPro: "Salazar... began to consider ways that they could work with each other in order to create new business opportunities. [¶] ... [¶] Salazar... began to arrange a meeting with his contacts at AT&T and HostPro's management, to discuss HostPro's acquisition of AT&T's small to medium Web-hosting customers as well as other potential business opportunities." (Italics added.)

Given that AT&T, Interland and Salazar all characterize the transaction as the transfer of a business and a business opportunity, it is immaterial that the transaction involved less than 2 percent of AT&T's total base of its small business customers, or that AT&T continued to provide Web-hosting services to large clients, or that AT&T continued to provide other types of services to the small and medium clients. AT&T sold and Interland purchased the customer contracts, supporting equipment and pledge of nonsolicitation for six months that comprised AT&T's Web-hosting business for small to medium-sized clients. The undisputed evidence supports the conclusion that the transaction constituted the sale of a business opportunity.

III. THE ORDER

GRANTING SUMMARY JUDGMENT

Salazar argues that the order granting summary judgment impermissibly contained new facts and facts not supported by the record. We address each of Salazar's assignments of error in turn and find no prejudicial error with respect to the order.

Salazar objected to the court's finding that Interland acquired "[a]ll of AT&T's contractual rights relating to its "Business Ready Dedicated Hosting Service" customers,"

3. In his opposition to Interland's separate statement, Salazar objected to the copy of the agreement proffered by Interland as lacking foundation. The record contains no ruling on his objection and it is, therefore, waived. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.)

because it was not contained in Interland's separate statement. But the contract was included in Interland's separate statement, and its terms were properly before the trial court. Among the assets listed as part of the sale were AT&T's "right, title and interest in the Customer contracts for the Services, to the extent such Customer contracts are applicable to the Services... and the other contracts and license agreements listed on Schedule 2.1, to the extent applicable to the Services..." The "Services" were defined as "AT&T Small Business Hosting Service" and "AT&T Business Ready Dedicated Hosting Service." The plain terms of the contract thus demonstrate that the customer contracts for the "Services" and other enumerated contracts and license agreements applicable to the "Services" were purchased by Interland, consistent with the trial court's factual finding.

Salazar also objected to the trial court's finding that "[a]ll of the "Dedicated Service Exclusive Equipment" used to service these customers," was sold to Interland on the grounds that it was not set forth in Interland's separate statement. But that precise phrase was in the separate statement and the contract explicitly provides that Interland bought "[a]ll of Seller's right, title and interest in and to all of the Dedicated Service Exclusive Equipment..."

Salazar objected to the finding that "[a]s part of the Asset Purchase Agreement, AT&T further agreed not to solicit the customers that were transferred as part of the transaction for a specified period of time and stipulated that it had no plan to provide such services in the future," as not supported by the evidence. He is partially correct. While the six-month limitation on AT&T's solicitation of the transferred customers is contained in the separate statement and the contract, we have not found, nor has Interland identified, any evidence of an agreement as to future services. But even if that portion of the order is mistaken, Salazar has not demonstrated that the error undermines the conclusion that the transaction between Interland and AT&T constituted the sale of a business opportunity. (See *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069 [only prejudicial error requires reversal].)

Finally, Salazar argues that he was not seeking a commission for the transaction between Interland and AT&T but rather his share of the monthly fees paid by each customer as he is entitled to under his contract with Interland. But the statute prohibits "the collection of compensation" for acting as an unlicensed business opportunity broker regardless of how that compensation is characterized. (§ 10136; see also § 10131 [broker defined as one who "for a compensation or in expectation of a compensation, regardless of the form or time of payment..."].)

We find no error in the form of the order granting summary judgment.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

DOI TODD, J.

We concur: BOREN, P.J., CHAVEZ, J.

Cite as 07 C.D.O.S. 7502

THE PEOPLE, Plaintiff and Respondent,
v.
CHRISTOPHER ANDERSON,
Defendant and Appellant.

Nos. C051985, C052358
In the Court of Appeal of the State of California
Third Appellate District
(Tehama)

(Super. Ct. Nos. NCR66211, NCR67197)

Filed June 26, 2007

APPEAL from a judgment of the Superior Court of Tehama County, Edward J. King III, Judge. Affirmed.

COUNSEL

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Bill Lockyer, Attorneys General, Dane R. Gillette and Mary Jo Graves, Chief Assistant Attorneys General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, and Catherine G. Tennant, Deputy Attorney General, for Plaintiff and Respondent.

CERTIFIED FOR PARTIAL PUBLICATION*

*Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts XVI through XX of the Discussion.

OPINION

Effective January 1, 2006, the California Judicial Council adopted the "Judicial Council of California Criminal Jury Instructions (2006-2007)" which instructions are cited as "CALCRIM No. _____." In the published portion of this opinion, we consider various challenges to a number of the new criminal instructions. Most of the challenges involve isolated language that defendant reads out of context from the instruction as a whole or the other instructions given to the jury. Other challenges concern language virtually identical to that previously approved in the CALJIC instructions that were used in California for many years. We reject each of defendant's challenges.

In the unpublished portion of this opinion, we address various sentencing issues, which we also conclude are without merit.

In Tehama County Superior Court case No. NCR66211, defendant pleaded guilty to one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and admitted a prior strike (Pen. Code, §§ 1170.12, subds. (a)-(d), and 667, subds. (b)-(i)) and a prior prison term (Pen. Code, § 667.5). In Tehama County Superior Court case No. NCR67197, defendant was convicted by a jury of second degree robbery (Pen. Code, § 211) and presenting false identification to a peace officer (Pen. Code, § 148.9, subd. (a)). He was also found to have used a deadly weapon in connection with the robbery (Pen. Code, § 12022, subd. (b)(1)). He appealed both convictions and we have consolidated those appeals for all purposes. We affirm the judgments in their entirety.

FACTS AND PROCEEDINGS

Case No. NCR66211

In April 2005, Officer Eric Magrini responded to a call regarding a disturbance in an apartment complex in

§ 10131. Real estate broker

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

(Added by Stats.1943, c. 127, p. 835, § 1. Amended by Stats.1955, c. 1678, p. 3013, § 1; Stats.1959, c. 2116, p. 4933, § 3; Stats.1959, c. 2117, p. 4939, § 4; Stats.1960, 1st Ex.Sess., c. 45, p. 388, § 1; Stats.1961, c. 886, p. 2324, § 4, eff. June 28, 1961; Stats.1965, c. 172, p. 1134, § 5, operative Jan. 2, 1966; Stats.1984, c. 177, § 1.)