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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHENG HSU,

Plaintiff - Appellee,

v.

PBIG MANAGEMENT COMPANY  
INC., a California corporation; et al.,

Defendants - Appellants,

and

GLOBALTEL RESOURCES INC., a  
corporation; et al.,

Defendants.

No. 05-16608

D.C. No. CV-97-20938-RMW

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted October 15, 2007  
San Francisco, California

Before: HUG, W. FLETCHER, and CLIFTON, Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Defendants Ken Huang and David Wu appeal from the district court's judgment in favor of Plaintiff Cheng Hsu following a bench trial. Defendants challenge the district court's findings of fact and conclusions of law, its imposition of time limits during trial, and its interpretation of California Corporations Code § 25102(h). We affirm.

Defendants formed a corporation, PBIG Management Co., Inc. (PBIG), and five limited partnerships, and sold securities to Plaintiff in the five partnerships. Based on the district court's factual findings, which we do not find clearly erroneous, Defendants engaged in general solicitation in connection with the sale of their securities. Defendants offered to sell their securities in a public library during PBIG meetings that the district court found "any interested party could attend." In addition, Defendants announced the PBIG investment opportunity and invited potential investors to attend the PBIG meetings at Pacific Bay Investment Club (PBIC) meetings. PBIC meetings were open to the public, held in a public library, and announced in a local newspaper. Had Defendants offered or sold PBIG securities at PBIC meetings, they would have violated state and federal securities laws. *See* 17 C.F.R. § 230.502(c) (prohibiting an issuer or any person acting on its behalf from selling unregistered securities by means of general solicitation, including, but not limited to, "any seminar or meeting whose attendees have been

invited by any general solicitation or general advertising.”); Cal. Code Regs. tit. 10, § 260.102.12(j) (same).<sup>1</sup> The fact that these sales occurred at subsequent, equally accessible PBIG meetings, to which the attendees of the generally advertised PBIC meetings were invited, did not materially diminish the public nature of the offerings or of Defendants’ solicitation. We therefore affirm the district court’s conclusion that Defendants engaged in general solicitation.

As Defendants engaged in general solicitation, they cannot satisfy the elements of California Corporations Code § 25102(f)’s registration exemption. *See* Cal. Corp. Code § 25102(f)(4); Cal. Code Regs. tit. 10, § 260.102.12(j). Their arguments concerning the district court’s determinations that they failed to establish that all investors were accredited and represented that their purchases were not for resale are beside the point. Defendants are not eligible for the statutory exemption.

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<sup>1</sup> The dissent argues that the prohibition on general solicitation under California law applies only when disclosure materials are distributed. Defendants distributed documents at its meetings disclosing the finances, history, products, sales figures, target markets, competitors, management teams, strategy, partners, and potential acquisition or IPO opportunities of the companies in which Defendants offered investments. Because we find that disclosure materials were distributed in this case, we do not decide whether the state securities laws permit individuals to engage in general solicitation in connection with the sale of securities in situations where federal law does not.

For the same reason, Defendants’ contention that the district court’s improper imposition of strict time limits prevented them from presenting evidence that would have established the qualifications or accreditation of each investor does not matter. Even if Defendants were given additional time to put on additional evidence of investor qualifications, and the district court found that all investors were qualified, Defendants would still have failed to satisfy the requirements for exemption under California Corporations Code § 25102(f) because they engaged in general solicitation. They therefore have not demonstrated that the district court’s imposition of time limits “adversely and unfairly affected their case.” *See Hansen v. Comm’r*, 820 F.2d 1464, 1467 (9th Cir. 1987).

Finally, we agree with the district court that California Corporations Code § 25102(h), which exempts from registration sales of common voting stock “in a corporation,” is inapplicable to sales of partnership interests. On its face, the exemption applies only to corporations, and the legislature’s express inclusion of both corporations and partnerships in an analogous exemption in the same statute indicates that it did not intend subsection (h) to also apply to partnerships. *See Cal. Corp. Code § 25102(h), (n)(1); Russello v. United States*, 464 U.S. 16, 23 (1983) (holding that where a legislature “includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

[the legislature] acts intentionally and purposely in the disparate inclusion or exclusion.”). The district court therefore properly rejected Defendants’ argument that their sales of unregistered securities in the five PBIG limited partnerships were exempt under California Corporations Code § 25102(h).

**AFFIRMED.**