BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 82A-231
SOUTHWESTERN DEVELOPMENT)
COMPANY)

For Appellant: Sheldon S. Baker
Attorney at Law

For Respondent: John A. Stilwell, Jr.
Counsel

O P I N I O N

This appeal is made pursuant to section 25666[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Southwestern Development Company against a proposed assessment of additional franchise tax in the amount of $100,229 for the income year ended October 31, 1978.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the income year in issue.

There are several issues presented in this appeal. The first issue is whether the funds transferred by appellant to Weaver Associates, Inc., were loans or contributions to capital which became worthless during the income year ended October 31, 1978. The second issue is whether the Weaver Associates, Inc., stock owned by appellant became worthless during the income year ended October 31, 1978. The third issue in this appeal is whether the funds transferred by appellant to Globex Minerals, Ltd., were loans or contributions. to capital which became worthless during the income year ended October 31, 1978. The final issue is whether the interest income received from Weaver Associates, Inc., and Globex Minerals, Ltd., during the income years ended October 31, 1977, and October 31, 1978, was business income.

Appellant is a California corporation engaged in the petroleum business and in real estate development. Mr. Billings Ruddock, the sole owner of appellant, is the president of appellant and his brother, Merritt K. Ruddock, is the vice president.

The first issue in this appeal is whether funds transferred by appellant to Weaver Associates, Inc., (Weaver) were loans or contributions to capital which became worthless during the income year at issue.

Weaver was a California corporation of which appellant owned 42 percent of the stock. Weaver was engaged in the manufacture and sale of traffic signal control devices, During this period, Weaver.had substantial contracts with the California Department of Transportation (Caltrans) for the manufacture of signal control devices. Appellant, beginning in early 1974 and continuing until June or September of 1978, advanced funds to Weaver in the total amount of $935,325. The advances were exchanged for promissory notes, some of which had specified due dates and the remainder of which were payable on demand. All the notes provided for interest at specified rates. Appellant recognized interest income on the notes in the amount of $102,392.

In connection with the above-referenced advances, appellant also pledged as collateral $182,798 in certificates of deposit to enable Weaver to post performance bonds on the Caltrans contracts. In exchange for the pledged collateral and the other advances, appellant ultimately received a security interest in all of Weaver's assets.

By June of 1978, Weaver had missed numerous delivery deadlines and creditors' pressures for payment mounted steadily. Appellant at this time took action to obtain payment-of the notes and to protect the collateral pledged. By early September, a separate and unrelated entity, Energy Absorption Systems, entered into an agreement to purchase an 80-percent interest in Weaver. The only benefit appellant was to receive by this purchase was the potential for the completion of Weaver's obligations under the Caltrans contracts. If the contracts were completed, appellant's pledged collateral was to be released. This agreement, however, was ultimately rescinded by the purchaser and no other buyer could be found.

In October of 1978, appellant filed a lawsuit against Weaver, allegedly to protect its certificates of deposit from other Weaver creditors.. Tha other Weaver creditors, however, were successful in setting aside appellant's security interest in Weaver's assets and appellant agreed to subordinate its interest under the promissory notes to that of all other creditors. This creditor's agreement ultimately collapsed and in September of 1979, Weaver filed for reorganization with the bankruptcy court. A buyer was found in December of 1979 and the purchase agreement stated that Weaver stock had been worthless "for over a year". (Resp. Br. at 5.)

On its return for the income year ended October 31, 1978, appellant claimed deductions for the worthlessness of the Weaver "debt" in the amount of $1,037,717 ($935,325 in principal plus $102,392 in reported interest) plus the $182,798 in certificates of deposit pledged by appellant as collateral. Respondent denied the deduction taking the position that the advances were contributions to capital and not loans.

Appellant contends that the advances made were loans and in support of this position states that the Internal Revenue Service accepted the advances as loans on its federal tax return.

The question of whether appellant's advances to a corporation of which it owned 42 percent of the stock constituted a loan or a capital contribution is essentially one of fact on which the taxpayer bears the burden of proof. (See White v. United States, 305 U.S. 281 [83 L.Ed. 172] (1938).) A capital contribution is intended as an investment placed at the risk of the business, while a loan is intended to create a definite obligation

payable in *any* event. In other words, to qualify as *a* bad debt deduction, the advance must be made with a reasonable expectation of repayment. (Appeal of George E. Newton, Cal. St. Bd. of Equal., May 12, 1964; Gilbert v. Commissioner, 248 F.2d 399 (2d Cir. 1957), on remand, ¶ 58,008 T.C.M. (P-H) (1958), affd., 262 F.2d 512 (2d Cir.), cert. den., 359 U.S. 1002 [3 L.Ed.2d 1030] (1959).)

Section 24348, which governs the deductibility of bad debts, is substantially similar to section 166 of the Internal Revenue Code. It is well settled in California that when state statutes are patterned after federal legislation on the same subject, the interpretation and effect given the federal provisions by the federal courts and administrative bodies are relevant in determining the proper construction of the California statutes. (Andrews' v. Franchise Tax Board; 275 Cal.App.2d 653, 658 [80 Cal.Rptr. 403] (1969); Appeal of Horace C. and Mary M. Jenkins, Cal. St. Bd. of Equal., Apr. 5, 1983.) The courts, in attempting to deal with the problem of distinguishing a loan from a capital contribution, have isolated certain factors. While no single criterion or series of criteria can provide a conclusive answer (see Newmanv. Quinn, 558 F.Supp. 1035, 1039 (D.V.I. 1983)), the following have been considered:

(1) the proportion of advances to equity;

(2) the adequacy of the corporate capital previously invested;

(3) the control the donor has over the corporation;

(4) whether the advance *was* subordinated to the rights of other creditors;

(5) the use to'which the funds were put: and.

(6) whether outside investors would make such an advance.

In other words, a bona fide debt arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money. (Treas. Reg., § 1.166-1(c).) No deduction may be taken for a loan made with no intention of enforcing payment or where there was no reasonable expectation of repayment when the loan was-made. (Appeal of Harry and Peggy Groman, Cal. St. Bd. of Equal., Dec. 7, 1982.)

Applying the above consideration to the present case, we must conclude that the advances made to Weaver were contributions to capital and not loans. Appellant made advances totaling $935,325 to Weaver from February of 1974 to September of 1978. Weaver defaulted on the first note in 1976. At this time, only $275,000 had been advanced. Over the remaining period, appellant continued to advance funds to Weaver without, at that time, obtaining any collateral or security interest. The only security interest appellant took in Weaver's assets was taken in August of 1978, after the vast majority of the monies had already been advanced. It is known that as of August of 1978, Weaver's liabilities exceeded its assets by almost three times. Although an examination of this financial data does not conclusively establish that Weaver was inadequately capitalized, the circumstances do indicate that Weaver was continually in need of cash during the time when the advances were made. By September of 1978, appellant has acknowledged that all the money they had was needed to meet the hourly payroll. This is evidence that appellant could not have reasonably expected repayment. (Thaler, et al. v. Commissioner, ¶ 78,024 T.C.M. (P-H) (1978).)

The independent-creditor test also provides a useful analytical framework for ascertaining the economic reality of a purported debt. As was stated above, at the time the majority of the advances were made, no collateral or security interest was taken. While the advances were in the form of loans, where a closely held corporation is involved, form does not always correspond to the nature of the transaction because the parties can create whatever appearance may be of tax benefit to them despite the economic reality of the advance. (Dunmire v. Commissioner, ¶ 81,372 T.C.M. (P-H) (1981).) Form is not, therefore, the controlling factor. (Midland Distributors, Inc. v. United States, 481 F.2d 738 (5th Cir. 1973).) With respect to the present appeal, the record indicates that with the exception of $13,933 in interest paid in 1978, no other payments were made. The notes subsequently fell into default. The advances, furthermore, were unsecured. While a security agreement was prepared in the fall of 1978 after all the funds had been advanced, it was not prepared until any chance of priority had been lost. Advances made under such circumstances evidence an intent to invest capital. (Appeal of Credo Developers, Inc., Cal. St. Bd. of Equal., Feb. 28, 1984.) In light of all of Weaver's financial difficulties, it cannot reasonably be concluded that an objective creditor would have made an unsecured loan to Weaver.

The identity of interest between appellant and Weaver is also of consequence. Billings Ruddock, appellant's sole owner and president, owned 42 percent of the Weaver stock and was a personal friend of the Weaver brothers, who operated Weaver. While in itself this evidence is not conclusive, it does indicate an equity interest.

Having considered the totality of all the factors discussed above, we must conclude that the -funds advanced by appellant to Weaver were placed at the risk of the business and, therefore, represent contributions to capital. There is no evidence that appellant could reasonably have expected to be repaid.

In addition to finding that the advances were contributions to capital, not bona fide debts, we further conclude that it has not been shown that the advances became totally worthless in the year claimed as is required by section 24348. It has long been held that the standard for the determination of worthlessness is an objective test of actual worthlessness, the time for which must be fixed by an identifiable event or events which furnish a reasonable basis for abandoning any hope of future recovery. (United States v. White-Dental Mfg. Co., 274 U.S. 398 (71 L.Ed. 1120] (1927).) Mere insolvency, without more, does not establish that fact but merely indicates that a debt may be only partially recoverable.. (Marshall v. Commissioner, ¶ 60,288 T.C.M. (P-H). (1960).)

Again, the burden is on appellant to show that the debt became totally worthless during the year for which the deduction is claimed. (Appeal of Lambert-California Corporation, Cal. *St.* Bd. of Equal,, Dec. 9, 1980.) Appellant contends that the identifiable event was the receipt of statements in 1978 from their accountant and lawyers that Weaver's future was hopeless. There is no doubt that by August of 1978 Weaver's liabilities exceeded its assets by a three to one margin; however, Weaver continued in operation well beyond the end of the year. The fact that Weaver continued to operate is evidence that the advances did not become worthless during the income year ended October 31, 1978. (See Appeal of Medical Arts Prescription Pharmacy, Inc., Cal. St. Bd. of Equal., June 13, 1974.) When a business continues in operation, it is difficult to conclude that there is a reasonable basis for abandoning any hope of future recovery. For the above-stated reasons, we must conclude that no bad debt deduction may be allowed..

A related issue is whether the pledged collateral of $182,798 is properly deductible by appellant as a bad debt.

Weaver had production contracts with the California Department of Transportation to manufacture traffic signal devices. On May 19, 1978, and June 30, 1978, appellant deposited three certificates of deposit in the total amount of $182,798 with the California Department of General Services as a performance bond, bonding Weaver's agreement to manufacture the traffic control devices for the California Department of Transportation. These deposits were made even though at this time Weaver's liabilities exceeded its assets by a three to one margin. For the same reasons we have found the other advances made to Weaver to be equity investments, we likewise conclude that the collateral pledged was an investment placed at the risk of the business. If Weaver was able to successfully manufacture the traffic signals, then money would be repaid. Like the other advances, this advance was unsecured and was only going to be repaid if Weaver completed its contract. There is no evidence that appellant could reasonably expect repayment unless the business was successful. Consequently, the collateral was an equity investment.

We, likewise, conclude that appellant has not shown that the pledged collateral became totally worthless in the year claimed. It was not until October 31, 1978, that appellant filed a lawsuit against Weaver, allegedly to protect its certificates of deposit from other creditors. Furthermore, the certificates of deposit were not sold by the Department of General Services until November of 1979. Given this evidence, we conclude that respondent's disallowance of this claimed bad debt deduction was correct.

The second major issue presented in this appeal is whether the Weaver stock owned by appellant became worthless during the income year ended October 31, 1978.

In the Appeal of Medical Arts Prescription Pharmacy, Inc., decided on June 13, 1974, this board stated:

> [D]eductions are allowed for any loss sustained during the income year and not compensated for by insurance or otherwise. (Rev. & Tax. Code, § 24347, subd. (a).) Securities which become worthless during the income year are treated as

losses pursuant to section 24347, subdivision (d), of the Revenue and Taxation Code, and advances which are capital contributions are included within the statutory definition of a security. (Phil Kalech, 23 T.C. 672; Cal. Admin. Code, tit. 18, reg. 24347; subd. (e)(l).) However, in order to be deductible, the loss must be evidenced by closed and completed transactions and fixed by identifiable events. (United States v. White Dental Mfg. Co., 274 U.S. 398 [71 L.Ed. 1120]; Cal. Admin. Code, tit. 18, reg. 24347(a), subd. (2).) Therefore, evdn if we assume'that the advances were contributions to capital, appellant must establish that the securities became worthless in the years for which the deductions were claimed. In order to do thin appellant must show that the securities bad value at the beginning of the year in question and that some identifiable event occurred during the year rendering the securities worthless by the end of that year. (United States v. White Dental Mfg. Co., supra.)

The burden is on appellant to establish that the securities became totally worthless in the year for which the deduction is claimed. (Appeal of William C. and Lois B. Hayward, Cal. St. Bd. of Equal., Oct. 3, 1967.)

In this case, appellant has failed to establish that the securities in Weaver became worthless in the income year ended October 31, 1978. The most important factor is that Weaver continued in business after October 31, 1978. This fact refutes the assertion that the securities became totally worthless during income year ended October 31, 1978. (See Appeal of Estate of John M. Hiss, Sr., Deceased, and Ella N. Hiss, Cal. St. Bd. of Equal., Sept. 23, 1974.) Accordingly, we conclude that respondent's action in disallowing the deductions claimed for the worthless stock was 'proper and must be sustained.

The third major issue in this appeal is whether the funds transferred by appellant to Globex Minerals, Ltd., were loans or contributions to capital which became worthless during the income year ended October 31, 1978,

Globex Minerals, Ltd., was a general partnership formed by Globex Minerals, Inc.; a California

corporation, to manage Globex Minerals Liberia, Inc. Both Globex Minerals, Ltd., and Globex Minerals Liberia, Inc., will hereafter be referred to as "Globex."

Globex owned and operated a concession in the Republic of Liberia for the mining of diamonds- and other precious minerals along a portion of the Lofa River. During 1974; Globex's first year of operation, Globex produced 10,054 carats of diamonds. No profits were made during 1974, however, because of the great capital expenses incurred in setting up the concession. On December 31, 1973, appellant advanced Globex $25,000 and in 1974, appellant advanced $72,500.

The production dropped to 1,336 carats in 1975; to 687 carats in 1,976; and to 213 carats in 1977, The mining was done in the river bed and almost every rainy season, floods destroyed some of the equipment which had been previously put in place along the river. Hence, with each rainy season there were additional expenditures and a reduction in the actual mining time. Globex also experienced pilferage problems. In 1976, appellant advanced Globex $115,145.77, making its total advances' $212,645.77. All these advances were evidenced by promissory notes with specified repayment dates and interest rates.

A review of the facts shows that until 1976, Globex had borrowed many funds from appellant and the various members of the Ruddock family. Merritt Ruddock, the vice president of appellant, was president of Globex Minerals, rnc., and a general partner of Globex Minerals, Ltd. Billings Ruddock, the sole owner of appellant, was a limited partner of Globex Minerals, Ltd. By late 1977, there were no more family sources of funds, so Globex sought out potential investors. The investors, however, prior to committing to any investment, wanted to determine whether the government of Liberia still held the concession in good standing. These numerous inquiries caused the government of Liberia to become suspicious that Globex no longer had the resources to continue the concession, of which the government received 50 percent of the proceeds. On July 7, 1978, the Liberian government forced Globex to sell 80 percent of its concession to Lemafor Development (Liberia), Inc., which was controlled by Joseph Hirsh of New York City. Lemafor Development (Liberia), Inc., operated the concession from July of 1978 through June of 1979 when the concession was irrevocably canceled by the government of Liberia.

On its return for the income year ended October 31, 1978, appellant claimed a bad debt deduction in the amount of $171,250, which represents the amount of unpaid principal- plus interest reported in income..

Respondent disallowed the claimed deduction holding that the advances made to Globex during the formation period (December of 1973 through December of 1974) were to launch the operations of Globex and, therefore, were investment capital. Respondent contends that the advances made in 1976 were made to protect the initial investment and, hence, were also capital contributions.

Appellant contends that when it ceased to make loans to Globex in June of 1976, it appeared that Globex would get additional financing from outside sources. However, once Globex was forced to sell 80 percent of its concession in July of 1978, it was unable to meet any of its obligations once they became due. Appellant contends that at this time, its debts'became worthless. Although Lemafor Development (Liberia), Inc., was to provide investments of up to $1,500,000, allegedly nothing near that sum was ever contributed. Appellant further contends that investigation into Lemafor Development (Liberia), Inc.'s, financial status indicated that legal action to enforce payment would entail large expenditures and would result in an uncollectable judgment at best.

Finally, appellant contends that the Internal Revenue Service's conclusion that the bad debt deduction should be allowed on its federal return should be binding on the State of California.

As was previously stated in our analysis of the advances appellant made to Weaver, the burden is on appellant to show that the advances to Globex were loans and not a capital contribution intended as an investment placed at the risk of the business. Appellant must also show that the debt became worthless during the income year ended October 31, 1978.

As to the issue of whether the advances were loans or contributions to capital, the facts show that the sole owner of appellant was also a limited partner in Globex Minerals, Ltd., and that his brother was president of Globex Minerals, Inc., and a general partner of Globex Minerals, Ltd. This evidence indicates that appellant, as the donor of the unsecured advances, may have had some control over Globex. When the donor has control of a debtor corporation, this indicates a capital investment

and not a loan. (See P. M. Finance Corp. v. Commissioner, 302 F.2d 786 (3rd Cir. 1962).)

The facts further show that advances totaling $97,500 were made in December of 1973 and throughout 1974 when Globex was just beginning its concession. By appellant's own statements, no profits were made through 1974 as any money they made was needed to pay for the equipment and other start-up costs. As this board has stated in the Appeal of Richard M. Lerner, decided on October 28, 1980:

> Where advances are necessary to launch an enterprise, a strong inference arises that they are investment capital, even though they may be designated as "loans" by the parties. (Sherwood Memorial Gardens, Inc., 42 T.C. 211, affd.., 350 F.2d 225 (7th Cir. 1965); . . .

There is also evidence that outside lenders, after 1976, would not lend money to Globex. While this evidence is not conclusive evidence that outside lenders would have failed to lend Globex money prior to 1976, it is known that prior to 1977, Globex relied on family sources for funds. On page two in a letter from John J. E. Markham, If, attorney for Globex, Mr. Markham states:

> In late 1977 some of the principals of the' Globex concerns determined that outside sources of capital were needed. Many funds had been borrowed from Southwestern, from various of the members of the Ruddock family and from others. There were no more family sources of funds which could be committed to this operation.

Given the fact that Globex was not making any profits the first few years, even when the production of diamonds. was high, and given the- fact that Globex relied only on various members of the Ruddock family to provide funds, it is 'doubtful that outside investors would have found Globex an attractive investment. (See Fin Hay Realty Co. v. United States, 398 F.2d 694 (3rd Cir. 1968).) Furthermore. it can be concluded that because the unsecured advances came from the various family members and their companies, the advances were made to protect their initial investments. Advances made to protect initial investments are capital contributions, not loans. (Appeal of Dudley A. and Sherrill M. Smith, Cal. St. Bd. of Equal., Dec. 15, 1976.)

As to the issue of whether there was a debt that became worthless during the income year ended October 31, 1978, appellant contends that when Globex was forced into selling 80 percent of its concession in July of 1978, the debt became worthless. Appellant also alleges that tropical storms and local pilferage *in 1978* helped to create *a* permanent condition that prevented Globex from ever repaying appellant's advances. Even concluding, which we do not, that the advances were loans, we cannot conclude that the advances became totally worthless during the appeal 'year. It was not until June of 1979 that the government of Liberia irrevocably canceled the concession. Until that time, Globex still owned 20 percent of its concession and, because the concession was still in operation through October of 1978, appellant could still have some hope of repayment. As was discussed above, when a business continues in operation it *is* difficult to conclude that the advances became totally worthless during the income year ended October 31, 1978. (See Appeal of Estate of John M. Hiss, Sr., Deceased, and Ella N. Hiss, supra.)

The final issue in this appeal is whether the interest income received from Weaver Associates Inc., and Globex Minerals, Ltd., *was* business income.

Respondent classified $96,926 in interest income for the income year ended October 31, 1978, as nonbusiness income. The loans were made to several businesses and members of the Ruddock family. Respondent's position is that appellant has not established that such income arose from loans made by appellant in the regular course of its business. Respondent has delayed action on a refund scheduled for the income year ended October 31, 1977, pending the outcome of 'the decision on this issue as it is identical to an issue affecting the refund.

Appellant contends that respondent's position is wholly inconsistent with its decision in appellant's protest for its income year ended October 31, 1970; that all of appellant's endeavors constitute a unitary business: and that all its *income is* business income.

Section 25120 provides in part that:

> (a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible

> property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.
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> * * *
>
> (d) "Nonbusiness income" means all income other than business income.

It is necessary to properly classify the income from appellant's loans because if the income is not earned in the regular course of business, it must be characterized as nonbusiness income and, therefore, cannot be apportioned between California and other states. In the Appeal of DPF Incorporated, decided by this board on October 28, 1980, we described the method to be undertaken to determine the nature of income received:

> It is now well settled that the . . . definition of business income provides two alternative tests for determining the character of income. The "transactional test" looks to whether the transaction or activity which gave rise to the income occurred in the regular course of the taxpayer's trade or business. Alternatively, the "functional test" provides that income is business income if the acquisition, management, and disposition of property giving rise to the income were integral parts of the taxpayer's regular business operations, regardless of whether the income was derived from an occasional or extraordinary transaction. (Appeal of Fairchild Industries, Inc., Cal. St. Bd. of Equal., Aug. 1, 1980; . . .

The relevant inquiry presented here, therefore, is a factual one. (See Appeal of General Dynamics Corporation, Cal. St. Bd. of Equal., June 3, 1975.)

It is well established that a presumption of correctness attends respondent's determinations as to issues of fact and that appellant has the burden of proving such determinations erroneous. (See Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Joy World Corporation, Cal. St. Bd. of Equal., June 29, 1982.) To overcome the presumed correctness of respondent's findings as to the relevant factual issue presented here, appellant must introduce credible evidence to support its assertions. If we find that it has failed to

do so, respondent's action in this matter must be upheld. (Buchanan v. Commissioner, 20 B.T.A. 210 (1930); Appeal of James C. and Monablanche A. Walshe, Cal. St. Bd. of Equal., Oct. 20, 1975.)

In the instant appeal, appellant has failed to offer any evidence as to the relevant issue. Instead, it has asserted that respondent's position is inconsistent with its decision in a protest by appellant for the income year ended October 31, 1970. In this earlier protest, appellant relied upon this board's decision in Appeal of Capital Southwest Corporation decided on January 16, 1973. Appellant has asserted that it was this board's position in Capital Southwest Corporation that all the income of a unitary corporation is considered to be business income., We cannot agree. In our prior opinion, we held certain dividends and capital gains to be unitary income because they arose basically from the same business operations as certain loan interest, which was admittedly unitary income. This holding cannot be construed to mean that all the income of a unitary business is necessarily business income, Rather, appellant must show under either the transactional test or the functional test that the interest income is, in fact, business income.

Appellant has not shown that the loans were related in any way to its petroleum business* Therefore, we must conclude that appellant has failed to carry its burden of proof as to this issue.

For the reasons discussed in detail above, respondent's action in this matter will be sustained.

Appeal of Southwestern Development Company

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Southwestern Development Company against a proposed assessment of additional franchise.tax in the amount of $100,229 for the income year ended October 31, 1978, be and the same is hereby sustained.

Done at Sacramento, California, this **10th** day of **September,** 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenburs, Jr., Chairman

Richard Nevins, Member

Walter Harvey* , Member

, Member

, Member

***For** Kenneth Cory, per Government Code section 7.9