

BEFORE THE
DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION
STATE OF CALIFORNIA

In the Matter of:

COMMISSIONER OF FINANCIAL PROTECTION
AND INNOVATION,

Complainant,

v.

ATLAS CAPITAL MANAGEMENT, INC. and
TRACY DENNIS TOWNER,

Respondents.

Agency Case No. 110018

OAH No. 2022120338

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Financial Protection and Innovation as its Decision in the above-entitled matter, with technical or other minor changes as shown on the Errata Sheet. The attached Errata Sheet is incorporated by reference pursuant to Government Code section 11517, subdivision (c)(2)(C).

This Decision shall become effective on November 20, 2024.

IT IS SO ORDERED THIS 21st day of October, 2024.

CLOTHILDE V. HEWLETT
Commissioner of Financial Protection and Innovation



**BEFORE THE
DEPARTMENT OF FINANCIAL PROTECTION AND
INNOVATION
STATE OF CALIFORNIA**

**In the Matter of the Accusation and Statement in Support of
Order Levying Administrative Penalties, and the Desist and
Refrain Order, Against:**

ATLAS CAPITAL MANAGEMENT, INC.

and

TRACY DENNIS TOWNER,

Respondents.

Agency Case No. 110018

OAH No. 2022120338

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on May 15 through 17 and 30 and 31, August 24 and 28 through 30, September 26, and October 2, 3, and 5, 2023.

Joshua Schieber, Senior Counsel, and Marlou de Luna, Senior Counsel, Enforcement Division, Department of Financial Protection and Innovation (DFPI) or

Department), represented complainant Clothilde V. Hewlett, Commissioner of Financial Protection and Innovation (complainant or Commissioner). On May 9, 2024, complainant provided OAH notice that Mr. Schieber had withdrawn as counsel for complainant. After that date, Amy Winn, Assistant Chief Counsel, Sheri Guerami, Senior Counsel, and Ms. de Luna filed post-hearing briefing and objections on behalf of complainant.

Brett G. Evans, Attorney at Law, represented respondents Atlas Capital Management, Inc. (Atlas), and Tracy Dennis Towner, who were present.

Oral and documentary evidence was received.

On February 20, 2024, complainant moved for portions of the record to be sealed. An appropriate sealing order was issued separately.

The record was held open to allow the parties to file closing briefs. Complainant's closing brief was due by February 16, respondents' closing brief was due by March 8, and complainant's reply brief was due by March 29, 2024. The record was to close and the matter was to be submitted on March 29, 2024.

Complainant filed a closing brief on February 20, 2024; the brief was marked for identification as exhibit 41.

By orders dated March 12 and March 21, 2024, the ALJ granted respondents' successive motions to extend their briefing deadline and also extended the deadline for complainant's reply briefing. Respondents filed their closing brief on April 2, 2024, eight days after the deadline set in the March 21, 2024 Order. The closing brief was accompanied by a request for official notice of 52 exhibits, in a three-part appendix; a 2,432-page appendix of transcripts; and an appendix of exhibits introduced at hearing.

b. Complainant amended the Desist and Refrain Order at page 6 (ex. 1, p. A28), changing the penultimate paragraph on that page to read as follows:

Pursuant to Corporations Code section 25532, Atlas Capital Management, Inc. and Tracy Dennis Towner are hereby ordered to desist and refrain from violating Corporations Code sections 25238 and 25245 and California Code of Regulations, title 10, sections 260.238 and 260.245. Atlas Capital Management is hereby also ordered to desist and refrain from violating Corporations Code sections 25235 and 25241 and California Code of Regulations, title 10, sections 260.235.4 and 260.241.4.

(Ex. 42, at Notice of Errata and Corrections, p. 2.) The amendments were timely filed; the matter was then submitted for decision. The amended matter is deemed controverted. (Gov. Code, § 11507.)

The record was closed and the matter was submitted for decision on June 14, 2024.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Atlas was a California corporation formed on January 17, 1997, doing business with a principal business address in Thousand Oaks, California. On September 12, 1997, the Commissioner issued an investment adviser (IA) certificate to Atlas, Central Registry Depository number 110018, under Corporations Code section 25230.

Respondent Towner, along with Craig Arsenault (Arsenault), not a party to this action, jointly owned Atlas from January 1, 2001, through December 31, 2018. Arsenault was Atlas's president during that period. Towner purchased Arsenault's interest in Atlas and became Atlas's sole owner and chief executive officer on December 31, 2018. On June 2, 2022, the California Secretary of State terminated Atlas's corporate status after Atlas filed articles of dissolution.

2. The Commissioner, through Joshua Schieber, Senior Counsel, in the Department's Enforcement Division, brought the Accusation on October 20, 2022. (Ex. 1, pp. A8-A21.) Three days later, on October 25, 2022, complainant issued the Desist and Refrain Order against Atlas and Towner, ordering them to desist and refrain from violating various Corporations Code sections and state regulations. (Ex. 1, pp. A23-A28.) The corporate dissolution of Atlas does not prevent the Commissioner from taking action against Atlas. (See Corp. Code, § 25242, subd. (b).)

3. Respondents filed a Notice of Defense to the Accusation and a Notice of Defense to the Desist and Refrain Order, each dated November 18, 2022. This action ensued.

Complainant's Allegations

4. In the Accusation, complainant alleges respondents:

(1) Violated Corporations Code section 25245 by (a) falsely representing, on a "Form ADV" filed with the Commissioner on March 4, 2019, as well as on Form ADV's filed on July 27, 2020, and September 15, 2020, that no court had enjoined Atlas from investment-related activity; and (b) failing to make a required disclosure on the Form ADV of a court judgment against Atlas (SEC Judgment) in a regulatory action the United States Securities and Exchange Commission (SEC) had

brought. A Form ADV is a document a registered IA must file as a condition of registration to provide regulators and the public critical information about the registrants.

(2) Violated Corporations Code section 25241 and California Code of Regulations, title 10, section 2660.241.4, by failing to promptly amend Atlas's Form ADV to disclose the SEC Judgment.

(3) Failed to amend the March 4, 2019 Form ADV, despite the Commissioner instructing them to do so in a June 10, 2020 regulatory letter, and then filing two more deficient Form ADV's, on July 27 and September 15, 2020.

(4) Failed to inform existing and prospective clients of facts material to respondents' ability to meet contractual obligations, thereby engaging in a fraudulent course of business in violation of Corporations Code section 25235 and California Code of Regulations, title 10, section 260.235.4.

(5) Engaged in IA activities, as an IA and as an associated person, that were contrary to the Commissioner's rules for promoting fair practices, in violation of Corporations Code section 25238.

(6) Violated California Code of Regulations, title 10, section 260.238, subdivision (h), by sending a letter to clients on April 2, 2019, that failed to make necessary disclosures and that contained misleading statements of fact, thereby misrepresenting respondents' qualifications.

(7) Failed to disclose to existing clients material facts, including the SEC Judgment, potential adverse financial remedies, an SEC bar order against Craig Arsenault (Arsenault Bar Order), and a judgment against Arsenault (Arsenault

Judgment), in violation of Corporations Code section 25235 and California Code of Regulations, title 10, section 260.235.4.

5. In the Accusation (as amended on June 14, 2024), complainant seeks (a) an order revoking Atlas's investment advisor certificate and (b) an order levying \$40,000 in administrative penalties jointly and severally against Atlas as a licensee and Towner as a person who managed, owned, and controlled Atlas, all under Corporations Code section 25252, for willful violations of the Corporate Securities Law of 1968 (CSL) (Corp. Code, §§ 25000-25707).

6. In the Desist and Refrain Order (as amended on June 14, 2024), based on the same allegations, complainant seeks, under Corporations Code section 25532, to order Atlas and Towner to desist and refrain from violating Corporations Code sections 25238 and 25245 and California Code of Regulations, title 10, sections 260.238 and 260.245, and to order Atlas to desist and refrain from violating Corporations Code sections 25235 and 25241 and California Code of Regulations, title 10, sections 260.235.4 and 260.241.4. The Commissioner found the Desist and Refrain Order to be "necessary, in the public interest, for the protection of investors and is consistent with the purposes, policies, and provisions of the Corporate Securities Law of 1968." (Ex. 1, p. A28.)

SEC Action

7. On December 13, 2018, the U.S. Securities and Exchange Commission (SEC) filed a complaint in the United States District Court for the Central District of California (*SEC v. Craig Arsenault et al.* (Case No. 8-18-cv-02220)) (SEC Complaint) alleging fraud by Arsenault and two entities he controlled—Atlas and ACT Global Investments (ACT). The SEC Complaint alleged Arsenault misrepresented the use of

investors' funds in the ACT fund, provided clients with deceptive account statements that made it appear as if these investments were generating substantial income when they were not, and misappropriated and misused over \$1 million of the client money invested with ACT;

8. On March 4, 2019, after Towner, on behalf of Atlas, consented to entry of judgment without admitting or denying the allegations in the SEC Complaint (Atlas Consent), the court entered a judgment in favor of the SEC (the SEC Judgment). The SEC Judgment permanently enjoined Atlas from violating federal securities laws by employing any scheme to defraud in connection with the purchase or sale of any security; making material misrepresentations or omitting to state material facts; and engaging in any practice that would deceive a purchaser in violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, section 17(a) of the Securities Act of 1933, or sections 206(1) and (2) of the Investment Advisers Act of 1940. The court also ordered Atlas to pay disgorgement or a civil penalty in an amount the court would determine later. (Ex. 5, p. A88.)

9. On March 15, 2019, the SEC issued the Arsenault Bar Order, barring Arsenault from association with any broker, dealer, investment advisor, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

//

//

//

//

Atlas's Disclosures after the SEC Judgment

MARCH 2019 FORM ADV

10. On March 4, 2019, the date the court entered the SEC Judgment, Atlas and Towner filed a report with the Commissioner disclosing Towner as Atlas's sole owner and chief executive officer.

11. On the same date, Towner, with the sole authority to act on behalf of Atlas, filed an amended Form ADV with the Commissioner. In the amended Form ADV, Towner answered "No" to Question H(1)(a) of Part 1, Item 11, which asks, "Has any domestic or foreign court in the past ten years, enjoined you or any advisory affiliate in connection with any investment-related activity." (Ex. 11, p. A155.) In the same Form ADV, in Part 2, Towner reported that Atlas had no disciplinary information to disclose. The Form ADV "Execution Pages" provide, in relevant part, "I, the undersigned, sign this ADV on behalf of, and with the authority of, the investment adviser. *The investment adviser and I both certify*, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act." (Ex. 11, p. A169, italics added.)

12. In fact, the March 4, 2019 Form ADV that Towner filed fail to report the SEC Judgment, to which Towner consented on behalf of Atlas on February 27, 2019. (Ex. 4, p. A77.) Towner testified at this hearing that he was aware of the SEC Complaint and the SEC Consent as of February 27, 2019, and that he was aware of the SEC Judgment as of March 4, 2019.

//

SUBSEQUENT FORM ADV'S

13. After filing the March 4, 2019 Form ADV, Atlas, through Towner, continued to misrepresent to the Commissioner that Atlas was not the subject of any disciplinary actions. Acting on behalf of Atlas, Towner filed Form ADV's on July 27, 2020, September 15, 2020, and March 18, 2021, repeating Atlas's false responses that no court had enjoined Atlas and that there was no disciplinary information to report. (Ex. 12, p. A223, ex. 13, p. A291, and ex. 14, p. A359.) Towner, for Atlas and for himself, certified under penalty of perjury the answers were true and correct. (Ex. 12, p. A237; ex. 13, p. A304; ex. 14, p. A372.)

14. Respondents argue that Towner, as late as November 2019, did not understand the scope of the Atlas Consent, which Towner had signed, and the SEC Judgment. This record has not established that. But even were that true in late November 2019, two months later, on January 17, 2020, the SEC's Donald Searles informed Towner, through his attorney, Frank Contreras, that the scope of the Atlas Consent and the SEC Judgment required Towner to correct Atlas's Form ADV.

15. Specifically, Searles, Senior Trial Counsel in the SEC's Division of Enforcement, directed Atlas to "file a corrected [Form] ADV immediately" because the Form ADV Towner filed on behalf of Atlas "falsely reports that no domestic court, in the past 10 years, has enjoined it in connection with any investment-related activity." (Ex. 30, pp. Z127-Z129, and ex. R304, pp. B6228-B6229.)

16. Towner failed to correct the Form ADV.

17. Towner continued to fail to correct the Form ADV despite also being instructed to do so by DFPI examiners in June 2019 (ex. 15, pp. A408-A409) and by

DFPI examiners again on October 1, 2020 (ex. 18, A426-A427). (See Factual Findings 25, 28, *infra*.)

18. Respondents' attorney, Frank Contreras, on January 17, 2020, referred Towner to an email attaching Searles's instructions to have Atlas "file a corrected ADV immediately" to disclose that Atlas was enjoined by a court "in connection with any investment-related activity". (Ex. 30, pp. Z127-Z129, and ex. R304, pp. B6228-B6229.) The following month, on February 11, 2020, Contreras emailed Towner, writing, "Tracy, please confirm that you file [*sic*] the revised ADV per our discussion. Thanks." (Ex. 30, p. Z127).

19. During the period between March 2019 and April 2022, Towner filed three more Form ADV's on behalf of Atlas that contained the false responses. Towner did not correct the answer Question H(1)(a) of Part 1, Item 11 of the Atlas Form ADV until April 4, 2022. (Exs. 27, p. Z65; R304, p. B6223.)

LETTER TO ATLAS CLIENTS

20. Respondents failed to promptly inform existing clients of all material facts with respect to a legal or disciplinary event that was material to an evaluation of the investment adviser's integrity. On April 2, 2019, less than one month after stipulating to the SEC Judgment and the permanent injunction in the SEC action, Atlas sent a letter to its clients that failed to disclose the SEC Complaint, the Atlas Consent, the SEC Judgment, the fact that the SEC could seek restitution and civil penalties against Atlas at a future date, and the Arsenault Bar Order. Instead, the letter stated that Arsenault had resigned his position at Atlas and that Atlas had been "vetted, analyzed and thoroughly reviewed by both the SEC and the California Department of Business Oversight." (Ex. 17, p. A424).

21. The SEC and the California Department of Business Oversight (now known as the DFPI) had not, in fact, "vetted, analyzed and thoroughly reviewed" Atlas. DFPI Financial Institutions Examiner Matthew Li and Financial Institutions Manager Miriam Clark both testified that DFPI does not as a matter of course make representations that an IA has been vetted, analyzed, and thoroughly reviewed. Towner testified that he did not recall anyone from DFPI informing him that Atlas was vetted, analyzed, and thoroughly reviewed. Respondents had not disclosed the SEC Judgment or the possibility of disgorgement to the DFPI as of the date of the letter. It was misleading for respondents to state that Arsenault had resigned from Atlas without disclosing the Arsenault Bar Order.

22. At the time respondents emailed the April 2, 2019 letter to their clients, Atlas was subject to disgorgement and civil penalties under the SEC Judgment, information potentially material to clients. On February 25, 2019, Towner confirmed with his attorney, Frank Contreras, "The ill-gotten gains are to be paid by as determined by the court, correct?" (Ex. R226, p. B5752). Contreras responded, "Yes, upon motion by the SEC the Court will determine what ill-gotten gains must be disgorged by Atlas and/or what civil penalty will be assessed." (Ex. R228, pp. B5756-5757.)

The Commissioner's Regulatory Examination of Atlas

23. The DFPI received a letter from Chuck Hughes, [REDACTED], dated June 25, 2019, concerning the Form ADV that Towner filed on behalf of Atlas in March 2019. Hughes, noting that Towner had once been employed at the [REDACTED], wrote that the Form ADV and the Part 2A forms "omit and deny" the SEC's enforcement actions against Atlas and the SEC Judgment, among other things, and "appear to be

inaccurate." (Ex. 61, p. B978.) Enclosing copies of the Atlas Form ADV, the Atlas Consent, the SEC Judgment, and other documents, Hughes wrote, "We refer this matter to your attention for whatever investigative or enforcement steps you deem appropriate." (Ex. 61, p. B980.)

24. On August 25, 2019, the Commissioner commenced a regulatory examination of Atlas's IA business. Matthew Li conducted the regulatory examination.

25. Examiner Li issued a regulatory report on June 9, 2020 (June 2020 Regulatory Report), notifying Atlas it must: (1) amend its Form ADV to disclose the SEC judgment; and (2) inform existing and prospective clients of any legal or disciplinary event material to an evaluation of the investment advisor's integrity as required by Corporations Code section 25235 and California Code of Regulations, title 10, section 260.235.4. The June 2020 Regulatory Report stated that respondents had provided no evidence that Atlas had so informed its customers. (Ex. 15, pp. A408-A409.) The regulatory report requested that Atlas "provide a copy of the disclosure provided to clients with the list of the clients for which such disclosure was provided." (Ex. 15, p. A409).

26. In their emailed June 29, 2020 response to the regulatory report, respondents wrote:

In regards to the SEC civil fraud complaint against [Atlas]-Craig Arsenault, [Atlas] provided attached letter to clients (See file attachment: Client Letter 04 02 2019) as soon as attorneys had (a) settled with the SEC and [Atlas]-Craig Arsenault, and (b) approved the attached letter could be released via email and conversation on March 28, 2019. The

letter was sent via email on April 2, 2019 (See file attachment: Client Notification Letter ADV 04 02 2019). . . ."

(Ex. 16, A422).

27. The April 2, 2019 client letter, however, failed to notify clients of the SEC Complaint, the Atlas Consent to judgment, the SEC Judgment against Atlas, the possibility of disgorgement and civil penalties against Atlas, or the Arsenault Bar Order. (Ex. 17, p. A424; see Factual Finding 20, *ante*.)

28. Examiner Li reiterated Atlas's disclosure requirements in an October 1, 2020 closing-of-examination letter. (Ex. 18, pp. A425-A427.)

29. At hearing, Towner claimed respondents never sent clients the April 2, 2019 letter, despite stating they did so in response to the regulatory report. Regardless of whether they did send the letter, respondents did not provide any evidence that they notified Atlas clients of the SEC Complaint and the SEC judgment after DFPI examiners requested this evidence. Nor did respondents offer testimony or written declarations from Atlas's clients that respondents ever informed Atlas's clients of the SEC Complaint, the Atlas Consent to judgment, the SEC Judgment against Atlas, or the Arsenault Bar Order.

Respondents' Arguments

ADVICE OF COUNSEL

30. Respondents seek to rely on a defense that their actions were based on advice of counsel. Advice of counsel is not a defense in a securities enforcement action. (See *People v. Clem* (1974) 39 Cal.App.3d 539, 542-543 [advice of counsel or other evidence of good faith is not a defense to a charge of violating the CSL (except

as provided by Corp. Code, § 25700, not applicable here)]; see also *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.)

31. Even assuming the defense were available, there is no evidence that Towner requested legal advice from his attorney about the two Form ADV sections he is charged with answering incorrectly in the Accusation and in the Desist and Refrain Order, i.e., Part 1, Item 11, Questions H(1)(a), and Part 2. On May 28, 2019, Towner asked his former counsel, Frank Contreras, about questions appearing in Part 1, Item 11, Questions C, D, and E. After Towner explained to Contreras what a Form ADV was, Contreras indicated that it was appropriate to answer "no" to these questions. (Ex. 33 at p. Z200-Z203.) Complainant does not charge respondents with any violations based on answering "no" to those questions.

32. Counsel for the SEC had made it clear to Towner and Contreras, on January 17, 2020, that a "no" response to Question 11(H)(1)(a) was inaccurate and directed them to correct it. (Ex. 30 at p. Z127-Z129.) Towner continued to refuse to make the correction despite having been told to do so by the SEC on January 17, 2020, by his attorney to do so on February 11, 2020, and by the DFPI to do so on June 9 and October 1, 2020. (See Factual Findings 14, 15, 18, 25, & 28, *ante*.)

33. On October 13, 2020, Contreras again advised Atlas to amend the Form ADV and directed Towner "to send a letter to clients disclosing the judgment against Atlas." (Ex. R321, p. B6315-B6316.) From at least March 4, 2019, to April 2, 2022, when Towner finally amended Atlas's Form ADV Part 2, Towner repeatedly refused to correct information on the form he knew was incorrect. The facts do not support a good faith advice of counsel defense.

//

LETTER TO CLIENTS

34. Respondents now claim that the misleading letter dated April 2, 2019 was never sent to Atlas clients.

35. But respondents told DFPI on June 29, 2020, that they sent Atlas's clients a letter shortly after the SEC disciplinary actions were entered in 2019. (See Factual Finding 26, *ante*.) Towner knew whether the letter was sent. It was reasonable for DFPI to believe the information Towner provided in the regulatory examination was accurate. DFPI relied on that information in undertaking its investigation of Atlas and in prosecuting this case. Respondents' new argument that the letter was never sent is not a defense to the charges.

LACHES

36. In their closing papers, respondents assert a laches defense. Respondents' alleged misconduct occurred between March or April 2019 and September 2020. The administrative actions were filed in October of 2022. There is no unreasonable delay and no delay that has disadvantaged respondents.

VIOLATIONS CORRECTED, ELIMINATING NEED FOR DESIST AND REFRAIN ORDER

37. Respondents identified in their closing brief admissions by Financial Institutions Managers Miriam Clark and Abu Rasel that Atlas corrected its violations of California Code of Regulations, title 10, sections 260.237.2, 260.241.2, 260.238, 260.241.3, 260.237.2, 260.241.2, and 260.236.1, all of which violations were the subject of allegations in the Accusation and the Desist and Refrain Order.

38. In view of Atlas's persistent and repeated past violations, through acts Towner performed on behalf of Atlas, the corrections respondents implemented prior to Atlas's dissolution do not vitiate the need, in the interest of public protection, for an order that respondents refrain from committing those violations in the future.

FINAL SEC JUDGMENT

39. Respondent argues that the March 4, 2019 SEC Judgment was not final and that it was superseded by a judgment entered on August 26, 2022. (See ex. R410, pp. B7106-B7109.) The court entered the August 26, 2022 version of the SEC Judgment in favor of the SEC, which permanently enjoined Atlas and its officers, agents, and other persons acting in concert with Atlas, from violating federal securities laws by employing any scheme to defraud in connection with the purchase or sale of any security; making material misrepresentations or omitting to state material facts; and engaging in any practice that would deceive a purchaser in violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder or in violation of sections 206(1) and (2) of the Investment Advisers Act.

40. Regardless of the existence of subsequent versions of the SEC Judgment and the legal effect of those versions, respondents had a legal obligation to disclose in Atlas's Form ADV and to customers the version of the SEC Judgment that issued on March 4, 2019. (See, e.g., Corp. Code, § 25232; Cal. Code Regs., tit. 10, § 260.235.4.)

ALLEGATIONS AGAINST TOWNER

41. Respondents argued that Towner cannot be liable for disclosure requirements for Atlas because those requirements apply to IA's, not to IA representatives, and that Towner, in taking such actions as signing the Atlas Consent and the Atlas Form ADV's, did not act on his own behalf as an individual but only on

behalf of Atlas. Li did not allege a violation against Towner individually in the regulatory report, and the closing letter only alleges violations by Atlas.

42. Nevertheless, no person may make false statements in Form ADV's, and no person associated with an IA may contravene ethical rules governing an IA. (See Corp. Code, §§ 25245, 25238.) Liability for violating Corporations Code sections 25235 and 25241 is shared by the IA and by persons who control the IA. (Corp. Code, § 25403.) Towner signed the Form ADV's under penalty of perjury on his own behalf as well as on behalf of Atlas. (See Factual Finding 11, *ante*.)

43. Towner claims he "only now understands" the SEC Judgment restrains Atlas. (Ex. R416, p. 31.) This is not credible considering the language of the SEC Judgment, documentation of communications to Towner and his attorney about the effect of the SEC Judgment, and other evidence in the record. (See, e.g., Factual Findings 8, 14-18, *ante*.)

44. Defenses based on Towner's status as an investment advisor representative (IAR) rather than an IA are without merit. "It is unlawful for any person willfully to make an untrue statement . . . in any application." (Corp. Code, § 25245.) "No investment adviser . . . and no natural person associated with the investment adviser shall [violate rules] . . . designed to promote fair equitable and ethical principles." (Corp. Code, § 25238.) Towner is liable under statutes that refer specifically to a broker-dealer or investment adviser (Corp. Code, §§ 25235, 25241) to the same extent as Atlas. "Every person who with knowledge directly or indirectly controls and induces any person to violate any provision of this division or any rule or order thereunder shall be deemed to be in violation of that provision, rule, or order to the same extent as the controlled and induced person." (Corp. Code, § 25403.) Towner, as

Atlas's sole shareholder and the only person with authority to sign Atlas's Form ADV's, caused Atlas to file inaccurate Form ADV's and violated the cited provisions.

WITNESS CREDIBILITY

45. Respondents' counsel spent approximately eleven days cross-examining complainant's witnesses and expressed frustration that witnesses were not providing answers he was hoping to elicit. Some of the witnesses had no knowledge or only indirect knowledge of facts or defenses on which they were cross-examined. Throughout counsel's protracted cross-examinations, these witnesses, despite some inconsistencies in their testimony and some gaps in their knowledge, did not cast doubt on their own credibility; their testimony was substantially corroborated by the documentary evidence supporting the allegations in this case.

OTHER LEGAL ARGUMENTS

46. The other legal arguments respondents raise in their closing brief as grounds for dismissing the Accusation, including those regarding burden of proof, lack of jurisdiction, mandatory time bars, and denial of due process (ex. R416, pp. 7-8), are incorrect as to the law, conflict with facts established in the record, were addressed at hearing or in pre-hearing motions, or otherwise lack merit, and are rejected.

LEGAL CONCLUSIONS

Applicable Authority

1. The Commissioner has jurisdiction over the licensing and regulation of persons engaged in the business of investment advising under the CSL and the rules and regulations promulgated thereunder. (Cal. Code Regs., tit. 10, § 260.000 et seq.)

2. It is unlawful for an IA to engage in fraudulent, deceptive, or manipulative business practices. (Corp. Code, § 25235.) Such practices include failing to disclose to clients or prospective clients legal or disciplinary events "material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients," including an order or judgment enjoining the IA from engaging in investment-related activity. (Cal. Code Regs., tit. 10, § 260.235.4.)

3. No IA "and no natural person associated with the investment adviser shall engage in investment advisory activities, or attempt to engage in investment advisory activities, in this state in contradiction of such rules as the commissioner may prescribe designed to promote fair, equitable and ethical principles." (Corp. Code, § 25238; Cal. Code Regs., tit. 10, § 260.238.)

4. Every licensed IA shall file such financial reports as the Commissioner by rule requires and must promptly file appropriate amendments when the information in any application changes. (Corps Code, § 25241, subd. (a); Cal. Code Regs., tit. 10, § 260.241.4, subd. (a).)

5. It is unlawful to willfully make an untrue statement of a material fact in any application, notice, or report filed with the Commissioner, "or willfully to omit to state in any such application, notice, or report any material fact which is required to be stated therein." (Corp. Code, § 25245.) To act "willfully" means to act intentionally; it does not require an intent to violate the law. (*People v. Clem, supra*, 39 Cal.App.3d at p. 542.)

//

//

6. Under Corporations Code section 25232, the Commissioner may, after hearing, revoke the certificate of an IA upon finding that the revocation is in the public interest and that the IA or any "partner, officer or director thereof" or "any person directly or indirectly controlling" the IA:

(a) has, in a certificate application or in any report filed with the Commissioner, willfully made a false or misleading statement with respect to a material fact or willfully omitted to state any material fact required to be stated. (Corp. Code, § 25232, subd. (a).)

(c) is enjoined by order, judgment, or decree issued by a court of competent jurisdiction from acting as an IA or as an affiliated person or employee of an IA. (Corp. Code, § 25232, subd. (c).)

(e) Has willfully violated the Securities Act of 1933, the Securities Exchange Act of 1934, and other enumerated statutes and regulations promulgated thereunder. (Corp. Code, § 25232, subd. (e).)

7. If the Commissioner finds that an IA is no longer in existence or has ceased to do business as an IA, the Commissioner may by order summarily revoke the certificate of the IA. (Corp. Code, § 25242, subd. (b).)

8. The Commissioner may, after notice and an opportunity for hearing, order administrative penalties be paid by any person, in the maximum amount of \$1,000 for a first violation and \$2,500 for subsequent violations, or any IA, in the

maximum amount of \$5,000 for a first violation, \$10,000 for a second violation, and \$15,000 for subsequent violations, for willfully violating the CSL. (Corp. Code, § 25252.)

9. Any person who knowingly controls another to violate a provision of the CSL is liable for the violation. (Corp. Code, § 25403.)

10. The Commissioner may issue an order directing a person who "has engaged, is engaging, or is about to engage in an act, practice, or course of business" in violation of the CSL to "desist and refrain from engaging in the illegal act or practice. (Corp. Code, § 25532, subd. (d).)

11. The Commissioner seeks to revoke a professional license and must, therefore, prove her case by clear and convincing evidence. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-57.)

Cause for Discipline

ACCUSATION AND STATEMENT IN SUPPORT OF ORDER LEVYING

ADMINISTRATIVE PENALTIES

12. Cause exists to revoke the IA certificate of Atlas, under Corporations Code section 25232, in that Atlas, as set forth in Factual Findings 7 through 29, engaged in the following conduct:

(1) Violated Corporations Code section 25245 by (a) falsely representing on Form ADV's filed with the Commissioner on March 4, 2019, July 27, 2020, and September 15, 2020, that no court had enjoined Atlas from investment-related activity; and (b) failing to make a required disclosure on the Form ADV of the SEC Judgment.

(2) Violated Corporations Code section 25241 and California Code of Regulations, title 10, section 2660.241.4, by failing to promptly amend Atlas's Form ADV to disclose the SEC Judgment.

(3) Failed to amend the March 4, 2019 Form ADV, despite the Commissioner instructing Atlas to do so in a June 10, 2020 regulatory letter, and then filing two more deficient Form ADV's, on July 27 and September 15, 2020.

(4) Failed to inform existing and prospective clients of facts material to an evaluation of respondents' integrity and of their ability to meet contractual obligations, thereby engaging in a fraudulent course of business in violation of Corporations Code section 25235 and California Code of Regulations, title 10, section 260.235.4.

(5) Engaged in IA activities, as an IA and as an associated person, that were contrary to the Commissioner's rules for promoting fair practices, in violation of Corporations Code section 25238.

(6) Violated California Code of Regulations, title 10, section 260.238, subdivision (h), by sending a letter to clients on April 2, 2019, that failed to make necessary disclosures and that contained misleading statements of fact, thereby misrepresenting respondents' qualifications.

(7) Failed to disclose to existing clients material facts, including the SEC Judgment, potential adverse financial remedies, and the Arsenault Bar Order and Arsenault Judgment, in violation of Corporations Code section 25235 and California Code of Regulations, title 10, section 260.235.4.

//

13. Cause exists to order Atlas and Towner to pay \$40,000 in administrative penalties jointly and severally to the Commissioner under Corporations Code section 25252, comprising (a) \$2,500 for violating Corporations Code section 25235 and California Code of Regulations, title 10, section 260.235.4, by engaging in a fraudulent, deceptive, or manipulative act, practice, or course of business by failing to promptly disclose to clients a legal or disciplinary event material to an evaluation of the IA's integrity; (b) \$5,000 for violating Corporations Code section 25238 and California Code of Regulations, title 10, section 260.238, by violating ethical rules the Commissioner prescribed for investment advisory activities; (c) \$2,500 for violating Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, by failing to promptly amend the Form ADV filed with the Commissioner to disclose material disciplinary events; (d) \$15,000.00 for violating Corporations Code section 25245 by willfully misrepresenting to the Commissioner at least three times, on Part 1 of its Form ADV, that Atlas was not subject to a civil court order enjoining it from violating investment related activities when it was; and (e) \$15,000.00 for violating Corporations Code section 25245 by willfully failing to disclose the SEC Judgment to the Commissioner, at least three times, on Part 2 of its Form ADV, all as set forth in Factual Findings 7 through 29.

DESIST AND REFRAIN ORDER

14. Cause exists under Corporations Code section 25532 to order Atlas and Towner to desist and refrain from violating Corporations Code sections 25238 and 25245 and California Code of Regulations, title 10, sections 260.238 and 260.245, and to order Atlas to desist and refrain from violating Corporations Code sections 25235 and 25241 and California Code of Regulations, title 10, sections 260.235.4 and

260.241.4, in that Atlas and Towner engaged in actions repeatedly violating those statutes and regulations, as set forth in Factual Findings 7 through 29.

Appropriate Discipline

15. Revocation of Atlas's investment adviser certificate and imposition of administrative penalties are warranted based on respondents' repeated violations of the CSL, as set forth in Factual Findings 7 through 29 and Legal Conclusions 12 and 13. Atlas and Towner repeatedly failed to act in the best interests of clients even after being told to do so by both the federal and state securities regulators. These violations were not isolated but began in March of 2019 and continued until Atlas filed its Certificate of Dissolution around June 2, 2022. Respondents presented no evidence that they ever fully disclosed to clients the SEC actions against Atlas and Arsenault as required of a fiduciary. Nor did Towner express any regret or remorse for respondents' repeated misrepresentations to clients and to the Commissioner. Without a revocation order against Atlas and findings of CSL violations against Towner, the interests of the investing public would be at risk.

16. Administrative penalties in the amount of \$40,000 against respondents, jointly and severally, are warranted based on respondents' willful violations of the CSL and rules and regulations promulgated thereunder, as set forth in Factual Findings 7 through 29 and Legal Conclusions 12 and 13. The administrative penalties are reasonable and necessary and are in the public interest.

17. An order upholding the desist and refrain order is necessary to prohibit respondents from misrepresenting material facts to advisory clients and to the Commissioner in the future and to notify the investing public that respondents

violated multiple sections of the CSL, as set forth in Factual Findings 7 through 29 and Legal Conclusions 12 and 13.

ORDER

The Investment Adviser Certificate the Commissioner issued to Atlas under Corporations Code section 25230 is revoked.

Atlas and Towner shall desist and refrain from violating Corporations Code sections 25238 and 25245 and California Code of Regulations, title 10, sections 260.238 and 260.245.

Atlas shall desist and refrain from violating Corporations Code sections 25235 and 25241 and California Code of Regulations, title 10, sections 260.235.4 and 260.241.4.

Atlas and Towner, jointly and severally, shall pay to the Commissioner administrative penalties totaling \$40,000.

DATE: **07/14/2024**


Howard W. Cohen (Jul 14, 2024 12:01 PDT)

HOWARD W. COHEN

Administrative Law Judge

Office of Administrative Hearings