BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order Issued to: CLSF MANAGEMENT, LLC, CONTINENTAL COMMUNITIES, LLC, CONTINENTAL LIFE SETTLEMENT FUND II, LLC, and ROBERT E. ZUCKERMAN, Respondents.	OAH No. 2016120551

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated May 31, 2017, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on July 15, 2017.

IT IS SO ORDERED this 15 day of June, 2017.

JAN LYNN OWEN
Commissioner of Business Oversight

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order Issued to: CLSF MANAGEMENT, LLC, CONTINENTAL COMMUNITIES, LLC, CONTINENTAL LIFE SETTLEMENT FUND II, LLC, and ROBERT E. ZUCKERMAN, Respondents.	OAH No. 2016120551

PROPOSED DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter in Los Angeles, California on May 1-2, 2017.

Marlou de Luna, Senior Counsel, and Kelly Suk, Counsel, Department of Business Oversight (Department), represented Jan Lynn Owen, Commissioner of Business Oversight (Commissioner).

Paul Stanton, Esq. represented respondent Robert E. Zuckerman, who was present for the second day of the hearing, but not for the first. Mr. Stanton also stated an appearance for respondents CLSF Management, LLC (CLSF Management), Continental Communities, LLC (Continental) and Continental Life Settlement Fund II, LLC (CLSFII), but the powers, rights, and privileges of those companies are suspended under the Revenue and Taxation Code, precluding them from presenting a defense. (See *Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1365.) CLSF Management and CLSFII are also suspended under the Corporations Code, which has the same effect. (See *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 560.)

The matter was submitted on May 2, 2017.

SUMMARY

The Commissioner determined respondents offered and sold securities by means of communications that included misrepresentations or omissions of material facts, and ordered

them to desist and refrain from that activity. Zuckerman denies he or his companies misled investors, and attributed investor losses to unexpected events. A preponderance of the evidence established grounds for the Commissioner's Desist and Refrain Order. Therefore, it will be affirmed.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Commissioner is the Department's chief officer (Fin. Code, § 320), and is authorized to enforce the Corporate Securities Law of 1968 (Corp. Code, § 25000 et seq.).[1]

2. At all relevant times herein, Zuckerman, a California resident, was the sole member and manager of both Continental and CLSF Management, which were organized as California limited liability companies in September 2005 and January 2009, respectively. Continental and CLSF Management, in turn, were the original members of CLSFII, which was organized as a California limited liability company in February 2009. CLSF Management was CLSFII's managing member.

3. Continental's powers, rights, and privileges have been suspended under the Revenue and Taxation Code since August 1, 2014. CLSFII has been suspended under the Corporations Code since August 25, 2015, and under the Revenue and Taxation Code since November 2, 2015. CLSF Management has been suspended under the Corporations Code since February 26, 2016, and under the Revenue and Taxation Code since August 1, 2016.

4. On October 10, 2016, the Commissioner ordered respondents to "desist and refrain from offering or selling or buying or offering to buy any security in the State of California . . . by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." The Commissioner issued that order after determining respondents had offered and sold securities by means of such misleading communications, beginning in or about February 2009.

5. On October 17, 2016, Zuckerman was served with the Desist and Refrain Order, both personally and as the agent for service of Continental, CLSF Management, and CLSFII.

6. Respondents requested a hearing in a letter dated November 13, 2016, and waived the 15-day deadline for the hearing. (See Corp. Code, § 25532, subd. (f).)

---

[1] Undesignated statutory references are to the Corporations Code.

Investment Opportunity in CLSFII

7. Zuckerman operated his companies from a common address in Woodland Hills, California, and portrayed CLSFII as an opportunity for investors to profit from other persons' life insurance. In an "Investment Package" prepared by CLSF Management, Zuckerman described CLSFII as a fund that would originate and finance life insurance policies for select individuals, in exchange for sharing in the eventual death benefits or proceeds of selling the policies to "life settlement" investors. A "life settlement" is the sale of a life insurance policy by its owner to a third party purchaser, who assumes responsibility for premium payments in return for becoming a policy beneficiary.

8. According to the Investment Package, Zuckerman's strategy would be to originate and finance policies for which the expected premiums would be lower than the death benefits or policy value in the "extensive and vibrant" life settlement market. In the "simplest case," CLSFII "would offer to finance the premium payments for a given insured person who also wants to make a charitable donation to a church, synagogue or other charity or to protect a closely held corporation." The insured would not have to pay premiums, but would still receive a portion of the profit upon a sale of the policy to a life settlement investor, as would CLSFII.

9. In a typical transaction, the policy would be held in an Irrevocable Life Insurance Trust (ILIT), and CLSFII "would provide a loan to the trust that would bear interest . . . plus a participation in approximately half of the profit from (1) the life settlement transaction or (2) the life insurance proceeds in the event of death during the holding period." CLSFII would generally not own policies itself, to avoid the negative perception and "regulatory scrutiny" of "Stranger Owned Life Insurance." The Investment Package claimed such policies were "readily marketable . . . after a two-year period," when they became "incontestable and not cancelable . . . for any reason other than fraud." In addition, it claimed "the average current price for a life settlement in our target market is about 25% of the face amount of the policy . . . ."

10. Zuckerman gave an example in the Investment Package of a $120,000 investment yielding a two-year return of $87,500, or approximately 72% profit. He further stated: "Given that policies may take some additional time to sell and that part of fund distributions are made quarterly, we expect to see 30% to 35% returns per annum." While noting that returns would vary based on multiple factors, he described the investment as safe, stating: "Recognizing the rating A- and better rating for the insurance companies we utilize, the safety as to principal is better than that of an investment grade corporate bond issued by the same company. While not as safe as a 10 year U.S. Treasury Security which is now earning less than 2% per annum, the safety and likely returns make this investment structure unique."

11. Under the sample investment agreement that was attached, Continental would sell a percentage interest in its "50% Capital Account associated interests in CLSFII" (50% Capital Account) to an investor, who would receive capital and profit distribution rights

according to CLSFII's Operating Agreement. The Operating Agreement was also attached, and stated that Continental's 50% Capital Account was worth $1,300,000 as of February 11, 2009, which was the filing date of CLSFII's Articles of Organization. Continental also held another 30 percent interest in CLSFII as of that date, while CLSF Management held the remaining 20 percent. Zuckerman testified that Continental's 50% Capital Account was comprised of loans CLSFII had acquired, which were secured by life insurance policies in its target market.

12. Under the Operating Agreement, investors in CLSFII would become non-managing members, and would share in net profits or losses according to their percentage interests. For its management services, CLSF Management would be entitled to "General and Administrative Fees" of $10,000 per month for up to 26 months, an "Initial Organizing Fee" of $50,000, and other fees and operating costs. No member would be entitled to withdraw his or her investment before the dissolution and winding up of CLSFII.

13. Each investment agreement would attach performance projections, but would not guarantee a profit amount or timing, stating: "no representation have [sic] been made by the Seller in regard to the amount of Profits which such shall actually be distributed to Buyer. Projections which have been provided are based upon assumptions which may or may not prove to be true and no profit amount or timing is guaranteed by the Seller, CLSFII, nor CLSF Management, LLC, its Managing Member." Each agreement would also attach the Operating Agreement for CLSFII, which included statements about the company's purpose, solvency, capitalization, and commingling of funds and other assets:

> 2.4 Purpose of Company. The sole purpose of the Company [i.e., CLSFII] shall be for the financing of life insurance premiums on a participating basis, the acquisition and/or control of life insurance policies, and/or the sale of life insurance policies. Collectively the financing, acquisition and/or control and sale of life insurance policies shall herein be referred to as the "Project." The Company shall not engage in any business other than the management and operation of the Project. The Company shall be a single purpose company (SPC).
>
> [¶] . . . [¶]
>
> (d) Company is and will remain solvent and Company will pay its debts and liabilities (including, as applicable, shared personnel and overhead expenses) from its assets as the same shall become due.
>
> [¶] . . . [¶]
>
> (h) Company is adequately capitalized and will maintain adequate capital for the normal obligations reasonable foreseeable in a business of its size and character and in light of its contemplated business operations.

(i) Company will not commingle the funds and other assets of Company with those of any affiliate or constituent party or any other person.

Sales to Investors

14. In May 2009, Continental sold a 3.8 percent interest in its 50% Capital Account for CLSFII to Anthony Vienna (Vienna), a Los Angeles attorney whom Zuckerman had met through a mutual acquaintance. In June 2009, it sold another 3.8 percent interest to Barry and Cherry Vantiger (the Vantigers), who learned of the investment from Vienna, the corporate attorney for Mr. Vantiger's pharmacy. In September 2009, Continental sold another 3.8 percent interest to Patrick Rogan (Rogan), a Malibu attorney whom Zuckerman met through Vienna. Each investor paid $100,000, and Continental used the sample agreement from the Investment Package for each sale.[2]

15. Before investing, Vienna and Rogan both met with Zuckerman, and both received one or more written projections from him of two-year returns exceeding 70 percent. The record includes a one-page "Investment Analysis" dated February 11, 2009, and another one-page table of income projections dated March 9, 2009, showing such returns. (Exhibits 13, 18.) The Vantigers never met Zuckerman before investing, but Mr. Vantiger received the income projections from Vienna before doing so. Mr. Vantiger also received the Investment Package, although he could not recall when. Each sale agreement also recited that the buyer had received and reviewed CLSFII's Operating Agreement, and agreed to be bound by its terms.

Investment Losses

16. Vienna, the Vantigers, and Rogan received no profits, and lost their entire investments. The record also includes references to losses of other investors, but no other investors testified.

17. At the hearing, Zuckerman attributed the losses to sudden changes in the life settlement market, which kept him from selling any policies for CLSFII even after they became incontestable. He also described having cash flow problems when a business associate did not sell a policy for another life settlement fund under Zuckerman's control (Continental Life Settlement Fund, LLC). Zuckerman also testified that an unhappy investor began "interfering" with CLSFII's activities, and that other persons who at first seemed willing to invest in CLSFII did not, further reducing cash flow. Zuckerman did not present documents or other witnesses to corroborate these assertions, and his testimony alone did not establish their truth.

---

[2] The copies of the agreements in evidence do not include the three attachments referenced in them (CLSFII's Operating Agreement, an assignment of interest, and income projections). The copy of Vienna's agreement also lacks his signature, but he identified it as the operative agreement.

18. Most of the policies that CLSFII was supposed to finance had been terminated for nonpayment of premiums by March 2010. A spreadsheet in the record states that over $350,000 in premiums were unpaid by that time. (Exhibit 19.) Zuckerman testified he tried to "go long" on one or two policies (i.e., maintain them until the insured's death), but was unsuccessful in finding additional investors. CSLFII stopped operating completely in 2011.

Use of Investment Funds

19. In November 2013, the Commissioner subpoenaed account records from Bank of America for respondents and several other companies Zuckerman controlled. Continental's account records showed more than $600,000 in investor deposits between February and early September 2009, but only about $197,000 in cash withdrawals for policy premiums during that time (Zuckerman paid premiums by cashier's checks).[3] Bank records for the same period also show transfers of hundreds of thousands of dollars from Continental's account to Zuckerman's personal account, and to his accounts for companies other than CLSF Management and CLSFII, neither of which had their own bank account. Ken Wu, a Department corporation examiner, analyzed the bank records and testified about the deposits and transfers.

20. In his testimony, Zuckerman asserted Continental had the right to do whatever it wanted with the investor deposits, because investors paid Continental for a fractional interest in its 50% Capital Account in CLSFII. In his view, Continental, as the seller of that asset, had no obligation to invest the sales proceeds into what it just sold. According to him, he never told investors their money would be used to pay life insurance premiums, and it would not have made sense to do so, because CLSFII had other ways to pay premiums, including through third party loans. He believes investors received what they bargained for, and that the investment risks were adequately explained to them.

LEGAL CONCLUSIONS

Legal standards

1. Under section 25401, "[i]t is unlawful for any person to offer or sell a security in this state, or to buy or offer to buy a security in this state, by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which the statements were made, not misleading." "If, in the opinion of the commissioner, a person has violated or is violating section 25401, the commissioner may order that person to desist and refrain from the violation." (§ 25532, subd. (c).)

---

[3] Rogan's investment is not one of the deposits; Zuckerman testified he switched banks in September 2009.

2. Section 25019 defines "[s]ecurity" by listing transactions and instruments deemed to be securities, including "any . . . investment contract . . . ." "This list is 'expansive,' but is not applied literally. [Citations.]" (*People v. Black* (2017) 8 Cal.App.5th 889, 900.) Rather, "the 'critical question' . . . is whether a transaction falls within the regulatory purpose of the law regardless of whether it involves an instrument which comes within the literal language of the definition." (*People v. Figueroa* (1986) 41 Cal.3d 714, 735.)

3. A fact is "material" under section 25401 "if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision." (*People v. Butler* (2012) 212 Cal.App.4th 404, 422; *Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1986) 184 Cal.App.3d 1520, 1526; see *Basic Inc. v. Levinson* (1988) 485 U.S. 224, 231-232.) No showing of reliance or causation is required – the materiality standard is an objective one. (*Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1087-1088.) In addition, in an administrative or civil enforcement action, the Commissioner need not prove a respondent knew the statements or omissions were false or misleading. (See *People v. Simon* (1995) 9 Cal.4th 493, 516.)

4. The Commissioner has the burden of proving a violation of section 25401 by a preponderance of the evidence. (Evid. Code, §§ 115, 500.) A preponderance of the evidence "refers to 'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Respondents offered and sold securities

5. The evidence established that respondents offered and sold securities within the meaning of section 25019. In determining whether a transaction is an investment contract, and thus a security, "California courts have applied, either separately or together, two distinct tests: (1) the 'risk capital' test described in *Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 815 . . . , and (2) the federal test described in *S.E.C. v. W.J. Howey Co.* (1946) 328 U.S. 293, 298-299 . . . (*Howey*). [Citations.]" (*Reiswig v. Dept. of Corporations for State of California* (2006) 144 Cal.App.4th 327, 334 (*Reiswig*).) A transaction is a security if it satisfies either test. (*Ibid.*)

6. Under the "risk capital" test, a transaction is an investment contract when it is "'an attempt by an issuer to raise funds for a business venture or enterprise; an indiscriminate offering to the public at large where the persons solicited are selected at random; a passive position on the part of the investor; and the conduct of the enterprise by the issuer with other people's money.' [Citation.]" (*Silver Hills Country Club v. Sobieski*, *supra*, 55 Cal.2d at p. 815.)

7. Under the federal test, "an investment contract . . . means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. . . ." (*Howey*, *supra*, 328 U.S. at pp. 298-299.) The Ninth Circuit "ha[s] dropped the term 'solely' and instead

require[s] that 'the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.' [Citation.]" (*Hocking v. Dubois* (9th Cir. 1989) 885 F.2d 1449, 1455; see *United Housing Foundation, Inc. v. Forman* (1975) 421 U.S. 837, 852, fn. 16 [acknowledging the Ninth Circuit construction, but expressing no view on it].) In determining whether the federal test is met, "form should be disregarded for substance and the emphasis should be on economic reality. [Citation.]" (*Tcherepnin v. Knight* (1967) 389 U.S. 332, 336; see also *Howey, supra*, 328 U.S. at p. 298.)

8. The transactions at issue were investment contracts under the federal test. First, persons invested money. "'Investment' has been defined broadly to require only that 'a person entrusted money or other capital to another.' [Citation.]" (*Reiswig, supra*, 144 Cal.App.4th at p. 336, fn. 4.) Here, Vienna, the Vantigers, and Rogan each entrusted respondents with $100,000. (Factual Finding 14.)

9. Second, the investments were in a "common enterprise." (*Howey, supra*, 328 U.S. at p. 299.) A common enterprise "may be established by showing 'that the fortunes of the investors are linked with those of the promoters.' [Citation.]" (*S.E.C. v. R.G. Reynolds Enterprises, Inc.* (9th Cir. 1991) 952 F.2d 1125, 1130; see *S.E.C. v. Eurobond Exchange, Ltd.* (9th Cir. 1994) 13 F.3d 1334, 1340 [finding common enterprise when investor and promoter "shared the risk of loss"].)[4] Here, the fortunes of the investors were linked to those of respondents, because Continental and CLSF Management had ownership interests in CLSFII along with the investors. (Factual Finding 11.)

10. Third, there was an expectation of profits. The term "profits" refers to income from or return on an investment, including "dividends, other periodic payments, or the increased value of the investment." (*S.E.C. v. Edwards* (2004) 540 U.S. 389,394, 396 [noting "commonsense understanding" of profits as financial returns on investments]; *United Housing Foundation, Inc. v. Forman, supra*, 421 U.S. at p. 852.) Investors in CLSFII expected to receive returns on their investments, based on the offering documents. (Factual Findings 10, 15.)

11. Fourth, investors relied upon respondents' "'essential managerial efforts which affect[ed] the failure or success of the enterprise.' [Citation.]" (*Hocking v. Dubois, supra*, 885 F.2d at p. 1455.) In fact, the failure or success of the investments depended solely on their managerial efforts. (Factual Findings 2, 12; see *Howey, supra*, 328 U.S. at pp. 298-299.)

12. Zuckerman made no arguments to the contrary. Because the transactions at issue were investment contracts, they were securities under section 25019.

---

[4] "It is well settled that 'federal cases construing federal securities laws are persuasive authority when interpreting our state law.' [Citations.]" (*People v. Black, supra*, 8 Cal.App.5th at p. 905.)

Respondents violated section 25401

13. The evidence also established that respondents offered and sold these securities "by means of . . . communication[s] which include[d] . . . untrue statement[s] of material fact, or omitted to state . . . a material fact necessary in order to make the statements made, in the light of the circumstances under which the statements were made, not misleading." (§ 25401.) Respondents' communications about the securities included multiple untrue or misleading statements.

RESPONDENTS' PROFIT PROJECTIONS WERE MATERIALLY MISLEADING

14. First, respondents' profit projections of "30% to 35% . . . per annum" (Factual Finding 10) were materially misleading, because respondents' offering materials omitted to state the fact that Zuckerman would divert investor funds from CLSFII. Bank records show over $600,000 in investor deposits between February and September 2009, but only about $197,000 in premium payments, and transfers of hundreds of thousands of dollars to Zuckerman's personal account and to his accounts for companies other than CLSFII or CLSF Management. (Factual Finding 19.) A reasonable investor would consider this omitted fact important, and its omission made the profit projections misleading by concealing the risk that CLSFII could run out of money to pay premiums, which it quickly did. (Factual Finding 18.)

15. Zuckerman asserts respondents never promised to use investor funds to pay premiums, and that Continental could use those funds however it wanted, because it simply sold a portion of its ownership interest in CLSFII to investors. But the rapid failure of CLSFII undermines Zuckerman's assertion, and the complicated structure of the transaction does not justify his diversion of funds, particularly where he was the individual behind Continental, CLSF Management, and CLSFII. His plan to divert the investor funds needed to be disclosed to avoid misleading investors, but was not. (See *IIT v. Vencap, Ltd.* (S.D.N.Y. 1975) 411 F.Supp. 1094, 1106-1107 [failure to reveal to investors that one of company's principals intended to divert invested funds for his own use was material omission].)

16. Zuckerman also asserts the profit projections were just opinions, not untrue statements of material fact. But predictions, projections, and optimistic statements of belief may be actionable if any one of three "implicit factual assertions" in such statements is inaccurate: "(1) that the statement is genuinely believed; (2) that there is reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement." (*In re Apple Computer Securities Litigation* (9th Cir. 1989) 886 F.2d 1109, 1113; see also *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* (2015) __U.S.__ [135 S.Ct. 1318, 1327] [an opinion can give rise to false statement liability under federal securities law if it contains an "embedded" statement of untrue fact]; *People v. Butler*, *supra*, 212 Cal.App.4th at p. 422 [false promises are actionable under section 25401].) Zuckerman was aware of the undisclosed fact that he would divert investor funds from CLSFII, which tended to seriously undermine the accuracy of the profit projections.

17. Zuckerman notes that each investor agreement qualified the profit projections by stating: "[N]o profit amount or timing is guaranteed by the Seller, CLSFII, nor CLSF Management, LLC, its Managing Member." (Factual Finding 13.) Under the federal "bespeaks caution" doctrine, profit projections and other forward-looking statements are not actionable when accompanied by adequate and meaningful cautionary language or risk disclosures. (*In re Infonet Services Corp. Securities Litigation* (C.D. Cal. 2003) 310 F.Supp.2d 1080, 1089; see *In re Worlds of Wonder Securities Litigation* (9th Cir. 1994) 35 F.3d 1407, 1413 ["'[E]stimates of future performance, and similar optimistic statements in a prospectus are not actionable when precise cautionary language elsewhere in the document adequately discloses the risks involved.'"].) But the profit projections violated section 25401 even under this doctrine, because respondents did not adequately disclose the risks inherent in Zuckerman's diversion of funds from CLSFII, which quickly led to its failure.

RESPONDENTS MISREPRESENTED THE PURPOSE OF CLSFII

18. Second, the statement in CLSFII's Operating Agreement that "[t]he sole purpose of the Company shall be for the financing of life insurance premiums on a participating basis, the acquisition and/or control of life insurance policies, and/or the sale of life insurance policies" (Factual Finding 13) was untrue. Zuckerman also used CSLFII to solicit investment funds that he diverted to himself and to other companies he controlled. (Factual Finding 19.) The misrepresentation was material, because a reasonable investor would consider it important to know this would happen. (See *IIT v. Vencap, Ltd.*, *supra*, 411 F.Supp. at pp. 1106-1107.)

RESPONDENTS' STATEMENTS ABOUT THE SOLVENCY AND CAPITALIZATION OF CLSFII WERE MATERIALLY MISLEADING

19. Third, the statements in CLSFII's Operating Agreement that CLSFII "is and will remain solvent" and "is adequately capitalized and will maintain adequate capital" (Factual Finding 13) were materially misleading. "A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets." (Civ. Code, § 3439.02, subd. (a).) "Adequate capitalization means 'capital reasonably regarded as adequate to enable [the company] to operate its business and pay its debts as they mature.' [Citation.]" (*Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.* (9th Cir. 1984) 736 F.2d 516, 524.)

20. The rapid demise of CLSFII calls into question whether it was ever solvent and adequately capitalized. But even if it was at the beginning, respondents' promises it would remain so were misleading for the same reason the profit projections were misleading, i.e., because respondents omitted to state the fact that Zuckerman would divert investor funds from CLSFII. (See Factual Finding 19.) That undisclosed fact tended to seriously undermine respondents' assurances of continued solvency and adequate capitalization. (See *In re Apple Computer Securities Litigation*, *supra*, 886 F.2d at p. 1113.)

RESPONDENTS MISREPRESENTED THAT CLSFII WOULD NOT COMMINGLE ITS FUNDS WITH THOSE OF OTHERS

21. Fourth, the statement in the Operating Agreement that "[CLSFII] will not commingle the funds and other assets of Company with those of any affiliate or constituent party or any other person" (Factual Finding 13) was untrue. Respondents did not establish a separate bank account for CLSFII (or CLSF Management), and instead deposited investor funds in Continental's bank account, thereafter transferring large amounts to Zuckerman's personal account and to accounts of other companies he controlled. (Factual Finding 19.) A reasonable investor would consider it important that respondents were commingling investment funds with Zuckerman's personal funds and funds of his other companies.

22. Zuckerman asserts the investor funds did not belong to CLSFII, because Continental, not CLSFII, sold interests in its 50% Capital Account in CLSFII to investors. But Zuckerman was the individual behind both companies (and CLSF Management), and his argument elevates the complicated form in which he structured the investments over their substance. Moreover, if none of the funds in Continental's account belonged to CLSFII, Zuckerman would not have withdrawn about $197,000 from that account to pay premiums for CLSFII between February and September 2009. (Factual Finding 19.) This alone establishes that he commingled CLSFII funds with those of an affiliate or constituent party (i.e., Continental).

23. Based on the above, the Commissioner was authorized to issue the Desist and Refrain Order (§ 25532, subd. (c)), and was justified in doing so.

ORDER

The Commissioner's Desist and Refrain Order is affirmed.

DATED: May 31, 2017

DocuSigned by:
Thomas Heller
CFDEA01421714A4...

THOMAS HELLER
Administrative Law Judge
Office of Administrative Hearings