

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the California Corporations
Commissioner,

v.

Alpha Capital Partners, LLC and Michael Mediano

OAH No.: 2011080295

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated December 28, 2012, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter with technical and minor changes on the attached Errata Sheet pursuant to Government Code Section 11517(c)(2)(C).

This Decision shall become effective on May 11, 2013.

IT IS SO ORDERED this 11th day of April 2013.

COMMISSONER OF CORPORATIONS

Jan Lynn Owen

ERRATA SHEET

(Changes to Proposed Decision – Alpha Capital Partners, LLC and Michael Mediano)

- 1) On page 5 of the proposed decision, paragraph number 15 of the Factual Findings, line 2, delete “advisor” and insert “adviser”.
- 2) On page 6 of the proposed decision, paragraph number 23 of the Factual Findings, line 1, add “the” after “in”.
- 3) On page 7 of the proposed decision, paragraph 2 of the Legal Conclusions, line 5, delete “Seciton” and insert “Section”.
- 4) On page 7 of the proposed decision, paragraph 3 of the Legal Conclusions, line 2, delete “advisor” and insert “adviser”.
- 5) On page 8 of the proposed decision, paragraph 5 of the Legal Conclusions, line 12, delete “Sate” and insert “State”.
- 6) On page 9 of the proposed decision, paragraph 11 of the Legal Conclusions, line 3, delete “advisor” and insert “adviser”.

**BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA**

In the Matter of:

THE CALIFORNIA CORPORATIONS
COMMISSIONER,

Complainant,

v.

ALPHA CAPITAL PARTNERS, LLC
and MICHAEL MEDIANO,

Respondents.

File No. 144075

OAH No. 2011080295

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on February 2, 2012, in Los Angeles.

Joanne J. Ross, Corporations Counsel, represented Complainant.

Michael Mediano represented himself and Alpha Capital Partners, LLC., as its sole owner.

Oral and documentary evidence was received, and argument was heard. The matter was submitted and the record was closed on February 2, 2012.

FACTUAL FINDINGS

1. On July 18, 2011, Alan S. Weinger in his official capacity as Deputy Commissioner, and on behalf of Preston DuFauchard, California Corporations Commissioner (Commissioner) of the Department of Corporations (Department), made and issued a Desist and Refrain Order; Claim for Ancillary Relief; and Order Levying Administrative Penalties to respondents Michael Mediano and Alpha Capital Partners, LLC.

Application for Investment Adviser Registration

2. Michael Mediano (Mediano) is the sole owner of Alpha Capital Partners, LLC (Alpha Capital). Alpha Capital is a limited liability company formed in 2004 under the laws of Delaware, with its principal place of business in El Segundo, California. Mediano has over 20 years experience working as a registered representative for various investment advisory firms.

3. (A) On June 2, 2008, Mediano filed a Form ADV Uniform Application for Investment Adviser Registration (application) to obtain an investment adviser registration from the Department for Alpha Capital. Mediano signed the application electronically on May 30, 2008.

(B) Item 5 of the application seeks information about the applicant's advisory business. Item 5(C) asks, "To approximately how many *clients* did you provide investment advisory services during your most recently completed fiscal year?" (Emphasis in original.) Mediano selected the answer "1-10." Item 5(F)(1) asks, "Do you provide continuous and regular supervisory or management services to securities portfolios?" Mediano selected the answer "Yes." Item 5(F)(2) asks, "If yes, what is the amount of your assets under management and total number of accounts?" Mediano indicated assets of \$11 million and a total of 12 accounts.

4. Balbiro Kazla was the Department's corporation examiner assigned to review the application. Ms. Kazla has been employed by the Department for 11 years. Her duties include reviewing investment adviser applications and related documents. She testified at the hearing. Based on her review of the application, Ms. Kazla found a significant issue with the answers to Items 5(C) and 5(F) because those answers indicated Alpha Capital had 12 existing client accounts with assets under management of \$11 million.

5. On June 30, 2008, Ms. Kazla sent Mediano an email requesting that he provide additional information about, among other things, his answers to Items 5(C) and 5(F) of the application. Ms. Kazla's email stated, in pertinent part:

1. Representation was made in Part 1A (Items 5C and 5F) of Form ADV that you have 12 accounts with assets under management of \$11 million. This representation implies that you have been conducting business as an investment adviser prior to obtaining an investment adviser certificate. Based on the foregoing, please furnish the following:

a. The date you started business as an investment adviser.

b. The reason(s) you did not comply with the certification requirement of Corporations Code Section 25230. If you were exempt from the provisions of Section 25230, please so state and cite the code sections under which you were exempt.

- c. A list of names and addresses of your investment advisory clients. . . .
- d. A schedule of complaints filed by any clients against you,
- e. A tentative disclosure statement indicating that you are not presently licensed as an investment adviser in the State of California and that an application for a certificate as an investment adviser has been filed.
- f. A statement that you understand that, until such time as the investment adviser certificate is issued, you make [sic] not provide investment advisory services to any new clients and you may not charge or collect any fees from existing clients.

Please note that a response to items c through f is not required if you were exempt from the provisions of Section 25230.

6. On July 9, 2008, Mediano filed another Form ADV Uniform Application for Investment Adviser Registration for Alpha Capital (revised application). In the revised application, Mediano changed the answer to Item 5(C) from "1-10" clients to zero clients; changed the answer to Item 5(F)(1) from "Yes" to "No," and all answers to Item 5(F)(2) were crossed out.

7. On July 24, 2008, Mediano sent Ms. Kazla an email response to her previous email of June 30, 2008. Mediano indicated he made changes to Items 5(C) and 5(F) and submitted the revised application. According to Ms. Kazla, Mediano indicated Alpha Capital had no existing clients, and his initial answers to Items 5(C) and 5(F) referred to future business and prospective clients. In his email, Mediano wrote, in part, "The changes reflect a future looking business that will be establish [sic] as soon as we get approval from the State of California Department of Corporations. The changes were applied to the number of asset [sic] under management and the number of clients. All additional changes reflect how we plan to do business going forward."

8. On August 1, 2008, the Department issued an investment adviser registration to Alpha Capital. According to Ms. Kazla, the registration was issued based on Mediano's representation in the revised application that he and Alpha Capital did not have existing investment advisory clients, and the Department's determination that all other qualifying requirements for a registration were met.

2010 Investigation of Unlicensed Activity

9. In May 2010, the Department conducted an unannounced, routine examination of Alpha Capital related to the Department's investigation of Mediano's possible involvement in recommending investments in a tequila company. This examination revealed no occurrences of Mediano recommending investments in the tequila company. However, the

examination revealed possible evidence of unlicensed advisory activity by Mediano and Alpha Capital.

10. Brian Denzler is the Department's corporations examiner who conducted an investigation in May 2010 regarding possible unlicensed advisory activity by Mediano and Alpha Capital. Mr. Denzler has been employed by the Department as a corporations examiner for the past six years. His duties include conducting examinations of brokers and investment advisers. Mr. Denzler testified at the hearing.

11. As part of his investigation, Mr. Denzler conducted an examination of Alpha Capital's records at its office in El Segundo and spoke with Mediano. As part of his pre-examination preparation, Mr. Denzler reviewed the Department's permanent file for Alpha Capital, which included the application and the revised application. Mr. Denzler asked Mediano about the changed answers to Items 5(C) and 5(F) in the applications. According to Mr. Denzler, Mediano stated he could not recall completing the Form ADV applications as part of the licensing process and reiterated that neither he nor Alpha Capital had advisory clients prior to Alpha Capital being registered with the Department.

12. Mr. Denzler found that Alpha Capital had 15 clients who signed advisory contracts. He examined a sample of 10 of the client accounts. He found that five of the 10 clients had new account applications that were signed and dated between April to June 2007. The opening date for two of the 10 accounts could not be verified. Of the 10 advisory contracts sampled, Mr. Denzler found three of the contracts were not signed or dated, one contract was missing and could not be located by Mediano, and one of the six remaining contracts was dated in May 2007.

13. Mr. Denzler subsequently requested and obtained records from Fidelity Investments, which was the custodian and broker-dealer used by Alpha Capital for its client accounts. Fidelity Investments provided client account statements and new account applications dating back to the first Alpha Capital clients on record with Fidelity. Mr. Denzler's review of the Fidelity documents focused on any fees deducted and accounts opened prior to August 2008.

14. The new account applications revealed that Alpha Capital had new client accounts with Fidelity Investments that were opened in approximately April to June 2007. For example, the new account application and trading authorization form for one of the accounts was signed by the client/account owner on June 21, 2007. Mediano was designated as the Authorized Agent for the account, and he completed and signed the Authorized Agent Information form for the account on June 22, 2007. On this form, Mediano indicated that his relationship to the account owner was "Inv. Mgr.", his employer was Alpha Capital, and his occupation was "Inv. Mgr." (Exh. 10, p. 164.) Under the terms of the account, Mediano, as the Authorized Agent, was authorized to "inquire in, trade, buy, sell (including short sales), exchange, convert, tender, trade, or otherwise acquire or dispose of stocks, bonds, securities, and other investments, on margin or otherwise, including the purchase and/or sale of option contracts" for and at the risk of the account owner. (Exh. 10, p. 162.)

15. Based on information in the client account statements provided by Fidelity, Mr. Denzler determined that Alpha Capital and Mediano received investment advisor fees that were paid by deductions made from six different client accounts between September 2007 and August 2008, in the total amount of \$156,964. The new account documents for these six clients identified Mediano and Alpha Capital as the investment adviser. The Fidelity Investment accounts were securities accounts. Mediano was not registered with any investment advisory or broker dealer firm from approximately April 2007 to August 2008. (Exh. 7.)

16. It was established that, from approximately April 2007 to August 1, 2008, Mediano and Alpha Capital conducted business as an investment adviser in this state without first obtaining a certificate from the Commissioner as required under Corporations Code section 25230, subdivision (a).

17. It was further established that, in the revised application, Mediano and Alpha Capital willfully made an untrue statement of material fact that they did not have existing investment advisory clients when, in fact, they had investment advisory clients for whom they provided services and charged and collected fees during the approximately one year period prior to Alpha Capital being issued its investment adviser registration by the Department.

Respondent's Testimony and Contentions

18. Mediano testified at the hearing. He strongly denied that he wrongfully or blatantly violated the law as contended by the Department.

19. Mediano testified that the client services he provided prior to August 1, 2008, were exempt from the registration requirement. According to Mediano, he was acting under the exemption provided by the Department's regulation which grants an exemption to investment advisers who do not hold themselves out generally to the public as an investment adviser, have fewer than 15 clients, and provide investment advice only to venture capital companies. (Cal. Code Regs., tit. 10, § 260.204.9 (Exhs. 12 and A).) Mediano's uncorroborated testimony was insufficient to establish he met the requirements for an exemption under the Department's regulation. Furthermore, his testimony that he relied on that exemption when providing client services prior to August 1, 2008, was not persuasive. At hearing, Mediano admitted that he did not inform the Department he was claiming an exemption under the Department's regulation, section 260.204.9. Ms. Kazla testified that Mediano did not tell her he was claiming an exemption, even though her June 30, 2008, email specifically asked him if he was claiming an exemption from the registration requirement and to identify the exemption.

20. Mediano also testified that some of the fees that were deducted from the client accounts with Fidelity Investments were for business management services, which do not require a registration from the Department. According to Mediano, his business management services for clients including paying bills, acting as a confidante, and dealing with real estate,

medical care, and insurance matters, on behalf of his clients. Mediano did not know what portion of the \$156,964 of fees that were charged and collected from the Fidelity client accounts were for business management services. He did not present documentary evidence to corroborate his testimony that the services he provided to clients, and the fees charged and collected, prior to August 1, 2008, were for business management services. At hearing, Mediano admitted that he did not disclose his business management services to Mr. Denzler.

21. Further, Mediano failed to disclose on Alpha Capital's revised application for an investment adviser registration that the services he was providing to clients were business management services. Item 6 of the application and revised application require disclosure of the applicant's other business activities. Item 6(B)(1) asks, "Are you actively engaged in any other business not listed in Item 6.A. (other than giving investment advice)?" Item 6(B)(2) asks, "If yes, is this other business your primary business?" If the answer is "yes," the applicant is instructed to "describe this other business on Section 6.B. of Schedule D." In the application submitted on June 2, 2008, Mediano answered "yes" to Items 6(B)(1) and (2). In Section 6.B. of Schedule D, Mediano described Alpha Capital's primary business as "money management." (Exh. 8, p. 107.) In the revised application submitted on July 9, 2008, Mediano changed the answers to Items 6(B)(1) and (2) to "no," and he crossed out the answer "money management" in Section 6.B. of Schedule D.

22. Mediano denies the Department's allegation that he willfully made untrue statements in the application and the revised application. He testified that he changed the answers to Items 5(C) and 5(F) based on advice he received from FINRA, who told him to change his answer to Item 5(C) to indicate he had zero advisory clients.¹ At hearing, Mediano admitted that he had clients and assets under management at the time of the revised application. He denies, however, the Department's contention that he changed the answers to Item 5 in order to hide unlicensed advisory activities. He maintains that, in the application, he answered Items 5(C) and 5(F) to reflect future business and prospective clients he expected after Alpha Capital received its registration. This contention is not persuasive, as the wording of those two items clearly asks about investment advisory services during "the most recently completed fiscal year."

23. Mediano has worked in securities industry for over 20 years. He has held high positions in banks and investment firms. He has undergone rigorous background checks. He has never had any complaints about him or other brokers who have worked under his supervision. Mr. Denzler's testimony established there is no history of customer complaints filed with the Department against Mediano or Alpha Capital.

24. Mediano has lived in Palos Verdes for 31 years. He has been married for 29 years and has three children. Mediano testified he does not have the money to pay the disgorgement sought by the Department. He testified that his clients have told him they do

¹ FINRA stands for Financial Industry Regulatory Authority, which is the largest independent regulator for all securities firms doing business in the United States. (www.finra.org.)

not want him to give the money back. He was "dropped" by Fidelity Investments. Some of his clients have left him and are not making any referrals. He testified that he has helped his clients over the years. He spent 30 years building his reputation in the securities business. He testified this matter has "wiped me out" and his business is ruined.

LEGAL CONCLUSIONS

Desist and Refrain Order

1. Grounds exist to uphold the Desist and Refrain Order issued to respondents Mediano and Alpha Capital under Corporations Code section 25532, in that said respondents engaged in unlicensed investment adviser activity in violation of Corporations Code section 25230, based on Factual Findings 2-16 and Legal Conclusions 2-3.

2. Corporations Code section 25230, subdivision (a), provides, in part: "It is unlawful for any investment adviser to conduct business as an investment adviser in this state unless the investment adviser has first applied for and secured from the commissioner a certificate, then in effect, authorizing the investment adviser to do so or unless the investment adviser is exempted by the provisions of Chapter 1 (commencing with Seciton 25200 of this part" Under Corporations Code section 25009, subdivision (a), an "investment adviser" is "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of a regular business, publishes analyses or reports concerning securities."

3. From approximately April 2007 to August 1, 2008, Mediano and Alpha Capital engaged in unlicensed advisor services in violation of Corporations Code section 25230, subdivision (a). Alpha Capital was issued its investment adviser registration by the Department on August 1, 2008. However, it was providing investment adviser services and charging and collecting fees for such services almost one year prior to that date. Mediano was not registered with any other investment advisory firm during that period. Mediano's claims that he was providing business management services and that he acted under an exemption were not persuasive. He presented no evidence to corroborate his claim about business management services. He did not know what portion of the deducted fees were for investment advisory services, which requires a registration, and what portion was for business management services. He failed to disclose these business management services in response to Item 6 of the revised application. Further, Mediano's claim that he conducted business on these client accounts prior to August 2008 in reliance on the exemption provided under the Department's regulation, section 260.204.9, was not persuasive. Although Ms. Kazla's email of June 30, 2008, specifically asked him about any claimed exemptions, he never told Ms. Kazla he was acting under an exemption from the registration requirement.

Administrative Penalty

4. Grounds exist, pursuant to Corporations Code section 25252, subdivision (b), to require respondents Mediano and Alpha Capital to pay an administrative penalty of \$6,000 for violating Corporations Code section 25230, subdivision (a), for unlicensed activity, and an administrative penalty of \$5,000 for violating Corporations Code section 25245, for willfully making an untrue statement of material fact in the revised application, for a total administrative penalty of \$11,000, based on Factual Findings 2-17 and Legal Conclusions 2, 3, and 5-8.

5. Corporations Code section 25252, provides in pertinent part:

The commissioner may, after appropriate notice and opportunity for hearing, by orders, levy administrative penalties as follows:

[¶] . . . [¶]

(b) Any broker-dealer or investment adviser that willfully violates any provision of this division to which it is subject, or that willfully violates any rule or order adopted or issued pursuant to this division and to which it is subject, is liable for administrative penalties of not more than five thousand dollars (\$5,000) for the first violation, not more than ten thousand dollars (\$10,000) for the second violation, and not more than fifteen thousand dollars (\$15,000) for each subsequent violation.

(c) The administrative penalties shall be collected by the commissioner and paid into the Sate Corporations Fund.

6. Corporations Code section 25245 states: "It is unlawful for any person willfully to make any untrue statement of a material fact in any application, notice, or report filed with the commissioner under this part, or willfully to omit to state in any such application, notice, or report any material fact which is required to be stated herein."

7. Mediano and Alpha Capital willfully made an untrue statement of material fact in the revised application that Alpha Capital had zero investment advisory clients, which the records from Fidelity Investments established was untrue. Mediano and Alpha Capital had at least six clients for whom they provided investment advisory services and charged and collected fees in the year before Alpha Capital was issued its registration by the Department. The circumstances surrounding the changed answers to Items 5(C) and 5(F) in the application and the revised application have a tendency in reason to prove that Mediano changed the answers to hide unlicensed investment advisory activity. He submitted the revised application after receiving Ms. Kazla's June 30, 2008, email raising a concern about unlicensed activity. Although he had an opportunity to do so, Mediano never mentioned to Ms. Kazla his belief that he was exempt from the registration requirement. The administrative penalty of \$5,000 for the violation of Corporations Code section 25245 is appropriate.

8. The Department has requested an administrative penalty in the total amount of \$70,000 for Mediano and Alpha Capital's unlicensed advisory activity. The record in this case established that Mediano and Alpha Capital's unlicensed activity involved the accounts of six different clients. At the hearing, the Department's counsel indicated that the purpose of the penalty was to send a message to respondents about their obligation to comply with all applicable laws and regulations. A total penalty of \$70,000 appears to be unduly harsh and punitive, given Mediano's current financial situation. A more appropriate amount that complies with Corporations Code section 25252, subdivision (b), is a penalty of \$1,000 for each of the six clients involved in the unlicensed advisory activity, for a total penalty of \$6,000. The administrative penalty for the violation of Corporations Code section 25230, subdivision (a), shall be reduced to a total penalty of \$6,000.

Ancillary Relief

9. Grounds do not exist, pursuant to Corporations Code section 25254, subdivision (a), to grant the Commissioner's claim for ancillary relief in the form of disgorgement by respondents Mediano and Alpha Capital of the fees totaling \$156,964 charged to clients while said respondents were engaged in unregistered investment advisory activities. (Factual Findings 8-16 and Legal Conclusions 10-11.)

10. Corporations Code section 25254, subdivision (a), provides: "If the commissioner determines it is in the public interest, the commissioner may include in any administrative action brought under this part a claim for ancillary relief, including, but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action, and the administrative law judge shall have jurisdiction to award additional relief."

11. The Department has requested that Mediano and Alpha Capital be ordered to disgorge the \$156,964 of fees charged to clients and collected prior to Alpha Capital obtaining its investment advisor registration in August 2008. This request shall be denied. No evidence was presented that any of the Fidelity Investment account owners filed complaints with the Department against Alpha Capital or Mediano. No evidence was presented that the account owners or their Fidelity accounts were adversely affected by the unlicensed activity of Mediano or Alpha Capital. Under these circumstances, an order of disgorgement for the \$156,964 fees collected during Alpha Capital's unregistered period is not appropriate.

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ORDER

1. The Desist and Refrain Order, OAH Case No. 2011080295, issued by the California Corporations Commissioner to respondents Michael Mediano and Alpha Capital Partners, LLC, is sustained. Said respondents are ordered to desist and refrain from acting as an investment adviser in the State of California unless and until they have first applied for and secured from the Commissioner a certificate, then in effect, authorizing them to act as an investment adviser, or unless exempt.

2. Respondents Michael Mediano and Alpha Capital Partners, LLC shall pay to the Department an administrative fine in the total amount of \$11,000 within 60 days of the effective date of this Decision and Order.

DATED: December 28, 2012

ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings