

1 WAYNE STRUMPFER
Acting California Corporations Commissioner
2 ALAN S. WEINGER
Acting Deputy Commissioner
3 DOUGLAS M. GOODING (83518)
Senior Corporations Counsel
4 71 Stevenson Street, Ste. 2100
5 San Francisco, CA 94105-2908
Tel: 415/972-8546
6 Fax: 415/972-8550
7 Attorneys for Complainant

8
9 BEFORE THE DEPARTMENT OF CORPORATIONS
10 OF THE STATE OF CALIFORNIA

12	In the Matter of)	CASE NO.
13	THE CALIFORNIA CORPORATIONS)	FILE NO. 927-0448
14	COMMISSIONER,)	STATEMENT IN SUPPORT OF ORDER
15	Complainant,)	LEVYING ADMINISTRATIVE PENALTIES
16	v.)	PURSUANT TO CORPORATIONS CODE
17	THOMAS CHARLES MARSELLA)	SECTION 25252 AND COMMISSIONER'S
18	dba EARNINGS INVESTMENT CO.)	INTENTION TO MAKE ORDER FINAL
19	Respondent.)	
20)	
21)	

22 WAYNE STRUMPFER, Acting California Corporations Commissioner (“Commissioner”)
23 of the Department of Corporations (“Department”) alleges and charges as follows:

24 1. THOMAS CHARLES MARSELLA (“Marsella”) holds a valid and unrevoked investment
25 adviser certificate issued by the Commissioner pursuant to Corporations Code section 25230 on
26 August 4, 1998. Marsella does business as an investment adviser, and also uses the fictitious
27 business name of “Earnings Investment Co.” (“Earnings.”) He has also used the name “Marsella
28

1 Financial Group LLC.” Marsella does business at 2787 W. Bullard Ave., Suite 109-B, Fresno,
2 California 93711.

3 2. On or about July 15, 2002, the Department commenced a regulatory examination of
4 Marsella’s investment adviser business (“the examination”). The examination revealed violations of
5 provisions of the Corporate Securities Law of 1968, Corporations Code sections 25000 et seq., and
6 the regulations thereunder, found at California Code of Regulations, title 10, sections 260.000 et seq.

7 3. These violations consisted of failure to maintain true, accurate and current books and
8 records; failure to maintain proper procedures for handling custody of client funds; failure to update
9 its required filings of information with the Department; failure to maintain fully executed written
10 investment advisory contracts; and failure to conform to fair, equitable and ethical principles in its
11 use of stationery and business cards.

12 4. Corporations Code section 25241 provides that investment advisers are required to
13 maintain books and records that are subject to examinations by the Commissioner. Section 25241
14 provides, in relevant part, as follows:

15 “(a) Every...investment adviser licensed under Section 25230 shall make and keep
16 such accounts, correspondence, memoranda, papers, books, and other records and
17 shall file such financial and other reports as the commissioner by rule requires,
18 subject to the limitations of . . . Section 222 of the Investment Advisers Act of 1940
19 with respect to investment advisers. (b) All records so required shall be preserved for
20 the time specified in the rule.

21 (c) All records referred to in this section are subject at any time and from time to time
22 to such reasonable periodic, special, or other examinations by the commissioner,
23 within or without this state, as the commissioner deems necessary or appropriate in
24 the public interest or for the protection of investors....”

25 5. California Code of Regulations, title 10, section 260.241.3 sets forth the specific books
26 and records that are required to be maintained by investment advisers and provides in pertinent parts
27 as follows:

28 (a) Every licensed investment adviser shall make and keep true, accurate and current
the following books and records relating to such person's investment advisory
business:

(1) A journal or journals, including cash receipts and disbursements records, and any
other records of original entry forming the basis of entries in any ledger.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.

(4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.

(6) All trial balances, financial statements, worksheets that contain computations of minimum financial requirements required under Section 260.237.1 or Section 260.237.2, as applicable, of these rules, and internal audit working papers relating to the business of such investment adviser.

(7) Originals of all written communications received and copies of all written communications sent by such investment adviser relating to

(10) All written agreements (or copies thereof) entered into by the investment adviser with any client or otherwise relating to the business of such investment adviser as such.

6. The examination indicated that 1) no journal or other books of original entry were prepared; 2) general and auxiliary ledgers (or other comparable records) were not maintained; 3) monthly cash reconciliations for the investment adviser activity checking account were not performed; 4) trial balances and balance sheets were not available for review; and 5) no client agreement (original or copy) for client Shigeko Okamoto was available for review.

7. California Code of Regulations section 260.237 provides in pertinent parts as follows:

Custody or Possession of Funds or Securities of Clients

It shall constitute a fraudulent, deceptive or manipulative act, practice or course of business, within the meaning of Section 25235 of the Code, for any investment adviser who has custody or possession of any funds or securities, except prepaid fees for periodic publications or other advisory services, in which any client has any beneficial interest to do any act or take any action, directly or indirectly, with respect to any such funds or securities, unless:...

...(e) all funds and securities of clients are verified by actual examination at least once during each calendar year by an independent certified public accountant or public accountant at a time which shall be chosen by the accountant without prior notice to the investment adviser. A certificate of the accountant stating that such person has made an examination of the funds and securities, and describing the nature and extent of the examination, shall be filed with the Commissioner promptly after each examination.

1 8. Marsella was found to have arrangements for automatic payment of fees from clients'
2 accounts. He was advised by the Department on or about August 12, 2002 that the Department took
3 the position that an investment adviser with such automatic payment arrangements must 1) send a
4 statement to the client showing the amount of the fee, the value of the client's assets upon which the
5 fee was based, and the specific manner in which the fee was calculated, and 2) disclose to clients that
6 it is the client's responsibility to verify the accuracy of the fee calculation and, that the custodian of
7 the account will not determine whether the fee is properly calculated. Marsella was advised on or
8 about August 12, 2002, that the two requirements above were not being met, and that he was
9 therefore being deemed to have custody of client funds and/or securities as a result of his automatic
10 fee payment arrangements and subject to the regulations applicable thereto.

11 9. California Code of Regulations section 260.241.4 provides in pertinent parts as follows:
12 Notice of Changes by Broker-Dealer and Investment Adviser.

13 (a) Each licensed broker-dealer and each licensed investment adviser shall, upon any
14 change in the information contained in its application for a certificate (other than
15 financial information contained therein) promptly file an amendment to such
16 application setting forth the changed information (and in any event within 30 days
17 after the change occurs)...

18 10. The Department's examination found that Marsella's Form ADV needed amendment in
19 the following ways: 1) Part I, page 1, items 2A and 3A to reflect current business location; 2) Part
20 II, page 2, question 1A to reflect investment supervisory services as Marsella's primary advisory
21 services; 3) Part II, page 4, item 8 to reflect Marsella's affiliation with Marsella Financial Group,
22 LLC as well as the relationship and arrangements between Earnings Investment Company
23 (Marsella's dba) and Marsella Financial Group, LLC; and 4) Part I, page 6, questions 19A (number
24 of non-discretionary accounts) and 19B (aggregate market value of non-discretionary accounts) to
25 be updated, since no amounts had been reported for these items since March 1998. Marsella was
26 requested to submit a properly amended Form ADV to reflect the above changes, with an original
27 notarized signature or an original signature "submitted under penalty of perjury."

28 11. California Code of Regulations section 260.238 provides in pertinent part as follows:
Investment Advisers: Fair, Equitable and Ethical Principles.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The following activities do not promote "fair, equitable or ethical principles," as that phrase is used in Section 25238 of the Code:

(n) Entering into, extending or renewing any investment advisory contract, other than a contract for impersonal advisory services, unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee or the formula for computing the fee the amount or the manner of calculation of the amount of the prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the adviser or its representatives.

12. The Department's examination revealed that Marsella did not have written investment advisory contracts in place for four clients, insofar as Marsella failed to sign them himself.

13. California Code of Regulations section 260.238 further provides in pertinent part:
Investment Advisers: Fair, Equitable and Ethical Principles.

The following activities do not promote "fair, equitable or ethical principles," as that phrase is used in Section 25238 of the Code:

(o) Making any untrue statement of a material fact or omitting a statement of material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading in the solicitation of advisory clients.

14. The Department's examination revealed that Marsella's business cards and stationery used the abbreviation "RIA" following his dba name on the stationery and following his name on the business cards. Marsella was advised on or about August 12, 2002 that this practice was in violation of SEC rules and advised to discontinue this practice and submit copies of proposed cards and stationery to the Department.

15. On or about August 12, 2002, the Department sent Marsella a regulatory letter notifying Marsella of various violations discovered during the July 15 examination as noted above, including violations of Corporations Code section 25241, and California Code of Regulations sections 260.241.3, 260.237, 260.241.4, and 260.238.

16. Marsella responded in an undated correspondence from Darin Marsella, the "office manager" (and Marsella's son). However, the substantive responses were unsatisfactory.

17. On or about September 13, 2002, the Department sent a second regulatory letter ("second letter") to Marsella acknowledging the response set forth above. The second letter advised Marsella that various items still needed to be resolved.

1 18. With regard to compliance with California Code of Regulations section 260.241.3, the
2 second letter noted that Marsella's records (including those submitted by Darin Marsella as
3 described above) did not reflect journal entries, showed inaccurate general ledger balances, were
4 missing cash reconciliations, reflected inaccurate trial balances and were lacking balance sheet
5 statements. Marsella had also failed to provide a copy of the client agreement with Okamoto. In the
6 second letter, Marsella was again asked to submit all previously requested records and to follow
7 generally accepted accounting principles.

8 19. With regard to compliance with California Code of Regulations section 260.237, the
9 second letter to Marsella noted that Marsella's automatic payment arrangements were still not in
10 compliance, in that the client authorizations to deduct fees signed by the clients with Investco Funds
11 were still not "payment-by-payment instructions from clients" as discussed in the original regulatory
12 letter of August 12, 2002. Marsella was directed to available procedures outlined by the SEC (SEC
13 No Action Leter dated June 5, 1996) to comply with that requirement. These included 1) sending a
14 copy of billing statements to clients before the bill is sent to the custodian (here, Investco); 2)
15 showing on the billing statement the specific manner in which the fee was calculated; and 3)
16 disclosing on the statement that it is the client's responsibility to verify the accuracy of the fee
17 calculation. Marsella was advised that failure to institute such guidelines would subject his firm to
18 regulatory requirements applicable to advisory firms deemed to have custody.

19 20. With regard to compliance with California Code of Regulations section 260.241.4, the
20 second letter acknowledged some amendments submitted by Marsella's to his Form ADV, but noted
21 that they did not adequately address the issues raised by the original regulatory letter. The second
22 letter noted the following continuing deficiencies in the Form ADV: 1) Part II, page 2, Marsella
23 indicated his business was 100% "investment supervisory services" and 100% "timing services,"
24 which were contradictory entries; 2) Part I, page 6, items 19A and 19B were still not updated; 3) the
25 form had still not been updated with a Schedule F to reflect and describe Marsella's relationships
26 and arrangements between Earnings Investment Company and Marsella Financial Group, LLC; and
27 4) if Marsella Financial Group, LLC was an affiliated financial planning firm, it also needed to be
28 licensed as an investment adviser, since it was a separate legal entity.

1 21. The second letter (dated September 13, 2002) directed Marsella to respond within 10
2 days. Marsella did not respond to the second letter.

3 22. On or about August 11, 2003, the Department issued a Desist and Refrain Order to
4 Marsella, Marsella Financial Group, LLC, Darin Marsella, Earnings Investment Company, and
5 Marcus Assay for violation of Corporations Code section 25210 (unlicensed broker-dealer activity)
6 regarding sales to investors of stock in an entity called UMC, Inc. Subsequently, the Department
7 conducted a follow-up examination of Marsella on or about February 25, 2004. During this
8 examination, Marsella provided client billing statements, custodian statements, and investment
9 adviser agreements. However, review of these documents revealed that the deficiencies cited in the
10 second letter (September 13, 2002) had not been corrected. Attempts to reschedule with Marsella
11 for further examination were unsuccessful.

12 23. On or about February 24, 2004, Darin Marsella, on behalf of Marsella, faxed to the
13 Department a copy of the second letter. On it were hand-written notations as follows: 1) on page 2,
14 in section II (regarding custody issues), the notation, "Okay, working on"; 2) on page 3, in section
15 III, #4 (regarding updates to Form ADV regarding affiliated entities) the notation, "We just do
16 annuities and it is our marketing name. That's it!", apparently referring to Marsella Financial Group,
17 LLC. These responses were not satisfactory.

18 24. On or about March 5, 2004, the Department received from Marsella various fee
19 statements, Earnings Investment Company Investment Advisory Agreements, custodian statements
20 of AIM Investments, an Investco Investment Adviser Authorization, and Investco account
21 applications. Review of these documents revealed that none of the deficiencies cited in the second
22 letter (September 13, 2002) had been properly addressed.

23 25. The Department was subsequently contacted by Scott R. Shewan, an attorney
24 representing Marsella. The Department sent to Shewan a letter on March 10, 2004 with a checklist
25 for documents to be provided by Marsella regarding the deficiencies listed in the second letter (of
26 September 13, 2002) and regarding private offerings believed to be the subject of Marsella's
27 unlicensed broker-dealer activities.
28

1 26. On or about March 29, 2004, the Department received from Marsella various
2 documents pertaining to some of the private offerings described in Paragraph 25. This response was
3 not complete, and the responses were not satisfactory.

4 27. On or about April 6, 2004, the Department received from Darin Marsella (on behalf of
5 Marsella) a list of clients, and an Investco Funds Investment Advisor Authorization for one client,
6 Anthony Doi. This was accompanied by a hand-written note stating, "Earnings Investment Co. does
7 not have custody of its clients cash or funds. We are currently working with Plan Compliance Group
8 on updating our ADV."

9 28. On or about May 19, 2004, the subjects of the Desist and Refrain Order (including
10 Marsella) withdrew their request for an administrative hearing to contest the Order. That Order is
11 therefore final as to Marsella.

12 29. To date, Marsella has not yet provided complete satisfactory responses to the
13 Department's letters of September 13, 2002 and March 10, 2004.

14 30. Corporations Code section 25249 authorizes the Commissioner to issue an order
15 directing any broker-dealer or investment adviser to discontinue any violation of the Corporations
16 Code and any rules promulgated thereunder. Specifically, Corporations Code section 25249
17 provides, in relevant part:

18 If, after examination or investigation, the commissioner has
19 reasonable grounds to believe that any broker-dealer or investment
20 adviser has violated any law or rule binding upon it, the
21 commissioner shall, by written order addressed to the broker-dealer
22 or investment adviser, direct the discontinuance of the violation.
23 The order shall be effective immediately, but shall not become final
24 except in accordance with the provisions of Section 25251.

25 31. Corporations Code section 25251 provides:

26 (a) No order issued pursuant to Section 25249 or 25250 may become final except
27 after notice to the affected broker-dealer or investment adviser of the
28 commissioner's intention to make the order final and of the reasons for the
finding. The commissioner shall also notify the broker-dealer or investment
adviser that upon receiving a request the matter shall be set for hearing to
commence within 15 business days after receipt of the request. The broker-
dealer or investment adviser may consent to have the hearing commence at a
later date. If no hearing is requested within 30 days after the mailing or service

1 of the required notice, and none is ordered by the commissioner, the order may
2 become final without a hearing and the broker-dealer or investment adviser shall
3 immediately discontinue the practices named in the order. If a hearing is
4 requested or ordered, it shall be held in accordance with the provisions of the
5 Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of
6 Part 1 of Division 3 of Title 2 of the Government Code), and the commissioner
7 shall have all of the powers granted under that act. If, upon the conclusion of the
8 hearing, it appears to the commissioner that the broker-dealer or investment
9 adviser is conducting business in an unsafe or injurious manner or is violating
10 any law of this state or any rule binding upon it, the commissioner shall make the
11 order of discontinuance final and the broker-dealer or investment adviser shall
12 immediately discontinue the practices named in the order.

(b) The broker-dealer or investment adviser may within 10 days after an order is
made final commence an action to restrain enforcement of the order. If the
enforcement of the order is not enjoined within 10 days by the court in which the
action is brought, the broker-dealer or investment adviser shall comply with the
order.

13 32. By reason of the foregoing, Marsella has violated California Corporations Code section
14 25241 and California Code of Regulations sections 260.241.3, 260.237, and 260.241.4.

15 33. Marsella violated California Corporations Code section 25241 and California Code of
16 Regulations section 260.241.3 by failing to maintain journal entries, accurate general ledger
17 balances, cash reconciliations, accurate trial balances, balance sheet statements and all client
18 agreements.

19 34. Marsella violated California Code of Regulations section 260.237 by failing to institute
20 guidelines and practices for automatic fee payments to avoid regulatory requirements for advisory
21 firms deemed to have custody of client funds.

22 35. Marsella violated California Code of Regulations section 260.241.4 by failing to
23 properly update information filed with the Department, including but not limited to describing his
24 business, its non-discretionary accounts, and its relationships with affiliated or other entities, such as
25 Marsella Financial Group, LLC. Therefore, pursuant to Corporations Code section 25249, the
26 Commissioner intends to issue an order directing Marsella to discontinue these violations.

27 36. The above violations justify the issuance of an order levying administrative penalties.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

37. Therefore, pursuant to Corporations Code section 25252, the Commissioner seeks administrative penalties in the amount of \$1,000 for violation of California Code of Regulations section 260.241.3 by failing to maintain journal entries, accurate general ledger balances, cash reconciliations, accurate trial balances, balance sheet statements and all client agreements. The Commissioner seeks an additional amount of \$1,000 for violation of California Code of Regulations section 260.237 by failing to institute guidelines and practices for automatic fee payments to avoid regulatory requirements for advisory firms deemed to have custody of client funds. The Commissioner seeks an additional \$1,000 for violation of California Code of Regulations section 260.241.4 by failing to properly update information filed with the Department, including but not limited to describing his business, its non-discretionary accounts, and its relationships with affiliated or other entities, such as Marsella Financial Group, LLC.

WHEREFORE, good cause showing, and pursuant to Corporations Code section 25252, the California Corporations Commissioner hereby notifies Marsella of its intention to make final an Order Levying Administrative Penalties Pursuant to Corporations Code section 25252 in the total amount of \$3,000.00.

Dated: April 19, 2006

San Francisco, California

WAYNE STRUMPFER
Acting California Corporations Commissioner

By: _____
DOUGLAS M. GOODING
Senior Corporations Counsel
Enforcement Division