BEFORE THE DEPARTMENT OF CORPORATIONS

OF THE STATE OF CALIFORNIA

In the Matter of:	Agency Case No.: 38300
THE CALIFORNIA CORPORATIONS COMMISSIONER,	OAH No. L2004060054
Complainant,	DECISION
v.	
SHEMANO CAPITAL MANAGEMENT,	
Respondent.	

The attached proposed decision of the administrative law judge is adopted by the Department of Corporations as its decision in the above-entitled matter, subject only to the following technical or other minor changes:

On page 7, Factual Finding Number 19, "Security" should be "Securities." On page 12 of the Proposed Decision, Factual Finding Number 36, the quoted statutory language is from Corporations Code Section 25254, but is mistakenly cited as Section 25256.

This decision shall become effective on July 7, 2005.

Dated: July 7, 2005

ANTHONY LEWIS
Acting Chief Deputy Commissioner
Department of Corporations

___/s/_____

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of: THE CALIFORNIA CORPORATIONS COMMISSIONER, Complainant, v. SHEMANO CAPITAL MANAGEMENT, Respondent.	File No. 925-2246 OAH No. N2004110263

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in Oakland, California, on January 13 and 14, 2005.

Joan E. Kerst, Senior Corporations Counsel, represented Complainant William P. Wood, Commissioner of the California Department of Corporations.

Phillip A. McLeod and Kevin J. Woods, attorneys with the law firm of Keesal, Young and Logan, represented Respondent Shemano Capital Management. Gary A. Shemano, President of Shemano Capital Management, was present.

The record was left open to receive written closing argument. A briefing schedule was determined by the parties. All briefs were timely received and marked for identification as follows: Complainant's closing brief regarding administrative penalties as Exhibit 20; Complainant's closing brief regarding discontinuance of violations as Exhibit 21; Respondent's closing brief regarding both issues as Exhibit I; and Complainant's reply brief regarding both issues as Exhibit 22. In addition, on February 4, 2005, Complainant filed a Certification of Costs: Declaration of Counsel, which was admitted into evidence as Exhibit 23.

The record closed on March 4, 2005.[1]

FACTUAL FINDINGS

BACKGROUND

1. On October 24, 1994, the California Corporations Commissioner (Commissioner) issued an investment adviser certificate to Shemano Capital Management, a California corporation (Respondent), located at 580 California Street, Suite 2211, San Francisco. On February 15, 2002, the certificate was revoked for failure to pay renewal fees.

2. Respondent is the general partner of Golden Gate Partners, L.P. (GGP), a small California limited partnership, formed in 1994 for the purpose of investing in securities. As GGP's general partner, Respondent conducts GGP's business, including maintaining its books and records, filing taxes and investing its assets. Respondent has never acted as an investment advisor for any other person or entity. Gary J. Shemano (Shemano) is Respondent's sole shareholder, officer and director.[2]

Since 2001, GGP has had only three limited partners–Shemano, who has owned in excess of 80% of the capital invested in GGP since at least 2001– and two others. As of October 2004, GGP has had only two limited partners– Shemano and one other investor. Respondent holds a power of attorney for GGP and has discretionary authority to purchase and sell securities on its behalf. Respondent, however, has always placed 100% of GGP's funds with outside money managers. Respondent is paid (or, at least, is owed) a fee for managing GGP's investment portfolio. This fee has generally been about $5,000 each year.

3. Licensed investment advisers in California are subject to the provisions of Corporations Code section 25000, et seq. and the corresponding regulations. This matter principally involves allegations by the Commissioner that Respondent violated various provisions relating to the requirements for the maintenance and accuracy of certain records and reports and that Respondent acted as an investment adviser after its certificate was revoked.

4. On October 22, 2004, the Commissioner issued two orders: an Order to Discontinue Violations Pursuant to Corporations Code section 25249 (accompanied by a Statement in Support of Order and Commissioner's Intention to Make Order Final) and a Statement In Support of Order Levying Administrative Penalties Pursuant to Corporations Code Section 25252 and Claim for Ancillary Relief Pursuant to Corporations Code section 25254. On December 22, 2004, the Commissioner issued an Amended Statement in Support

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[1] On March 9, 2005, a letter was received from Respondent's counsel. No leave to file an additional brief was requested or granted and the letter is therefore not accepted.

[2] Shemano is also the president of The Shemano Group, which is licensed by the Department as a broker-dealer.

of Order and an Amended Statement In Support of Order Levying Administrative Penalties Pursuant to Corporations Code Section 25252 and Claim for Ancillary Relief Pursuant to Corporations Code section 25254.

In essence, the Commissioner ordered Respondent to cease violating the law and to pay monetary penalties, including fines and restitution, for the violations. In summary, the Commissioner assessed: $750 for each of six books and records violations; $1,250 for failing to file an amendment; $2,500 for each of at least four instances of unlicensed activity; $5,000 for each of at least four instances of fraudulent conduct; $1,500 for failure to surrender a revoked certificate; $5,000 for each of three false statements; and $5,000 each for at least three instances of making an untrue statement or omission of a material fact. Ancillary relief prayed for included: disgorgement of at least $7,865 in management fees received while unlicensed and restitution for loss of principal of at least $50,952 plus interest of at least $87,253.20 during the time unlicensed. The Commissioner also prayed for cost recovery.

Respondent filed notices of defense regarding both orders and this hearing followed.

2000 EXAMINATION

5. During 2000, Department of Corporations (Department) examiners conducted a regulatory examination of Respondent's investment adviser business.[3] The examination was a routine procedure, not prompted by any report of unlawful activity. A field examination was conducted by examiner Matthew Lau on May 15, 2000. Lau concluded that Respondent was in violation of rules regarding the maintenance of books and records, net capital requirements and the requirement that the Department be notified of certain changes.

6. The Department's findings were communicated to Respondent by letter dated July 31, 2000, signed by Sandra Ramayla for Donald A. Osterman. At the time, Osterman was a Senior Corporations Examiner and was in charge of the Securities Regulation Division in Northern California. The letter states that:

> The results of our examination are being brought to your attention at this time for correction and future guidance. The exceptions are set forth below with the applicable sections of the California Corporations Code (CCC) and/or California Code of Regulations (CCR).

The following regulations were referenced and/or discussed: Title 10, California Code of Regulations, sections 260.237.1 (capital requirements); 260.237 (custody or possession of funds or securities of clients); 260.241.3 (books and records to be maintained by investment advisers); and 260.241.4 (notice of changes by broker-dealer and investment adviser).

[3] See Corporations Code section 25241, subdivision (c).

7. Title 10, California Code of Regulations, section 260.241.4, subdivision (a), requires advisers to file an amendment whenever certain types of information become inaccurate. Respondent was advised that it should file an amended Form ADV to reflect two changes: that the limited partnership is managed on a discretionary basis with an approximate aggregate market value of $3 million and that the current place of business is 601 California Street, Suite 1150, San Francisco, CA 94108. The letter states that the amendment should be received by Osterman no later than 15 days following its date (July 31, 2000).

8. Donald D. Mankin is a certified public accountant who is engaged by Respondent to perform certain tasks. He wrote a response to Osterman dated August 30, 2000. Mankin did not agree with the results of the examination and subsequent report of findings as documented in Osterman's letter. Following an explanation of his position, Mankin requested that Osterman issue a revised report that did not contain the findings he alleged were erroneous.

9. Osterman replied by letter dated September 25, 2000. He wrote:

> Although we shall accept your response as resolving Items I and II in our report, please note that the firm still needs to amend its Form ADV pursuant to Item III...
>
> Please note that this office should receive the amended Form ADV no later than 10 days following the date of this letter.

Items I and II contain all of the alleged regulation violations except title 10, California Code of Regulations section 260.241.4, subdivision (a) (notice of changes by broker-dealer and investment adviser).

10. Although the Department did not issue a "revised report" as requested, the language "Although we shall accept your response as resolving Items I and II," is clear.[4] The letter communicates the acceptance by the Department of Respondent's position regarding the alleged regulatory violations, except section 260.241.4, subdivision (a). For that violation, Respondent is instructed as to the means of correction; that is, to file an amended Form ADV within 10 days.

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[4] In addition, Donald Osterman testified at hearing. He confirmed that he accepted the information provided by Mankin that the Items I and II issues were resolved by Respondent's compliance with the "PIMS" standard (see Finding 19, below).

2003 EXAMINATION

11. As of December 22, 2004, Respondent had not filed an amended Form ADV with the Department.[5]

12. In 2003, the Department undertook another regulatory examination of Respondent's investment adviser business. The examination was prompted by Respondent's lack of licensure. The purpose was to investigate possible unlicensed activities. Examiner Amy Su began by reading Lau's 2000 report. Her pre-examination review included reading Osterman's letter of September 25, 2000, and Mankin's letter as well as other information in the file.

On July 21, 2003, Su conducted a field examination at Respondent's offices located at 601 California Street, Suite 1150, San Francisco. Su met with Michael K. McDonough, who had been in charge of Respondent's books and records since approximately March of 2002. McDonough acknowledged that the investment adviser certificate was revoked. McDonough told Su that they forgot to pay the renewal fee. Su then commenced an examination of the books and records.

13. Su verbally gave McDonough a list of the items she was requesting, which included general ledgers, trial balances, bank reconciliations and all the records supporting the ledger. Initially, McDonough showed her a check register and said "This is all we have for the investment advisory business." He did not give her a copy of the register. Subsequently, McDonough gave Su copies of monthly bank statements dated from February 14, 2002, to June 16, 2003. A trial balance as of December 31, 2002, was also provided. Su concluded, however, that the general ledgers and balance sheets of year 2002 and year 2003 had not been adequately prepared on a monthly basis. And, by the end of the examination, the general ledger and trial balances for year 2003 were still not provided.

In summary, Su concluded, similarly to Lau in 2000, that Respondent was in violation of provisions regarding the maintenance of books and records, net capital requirements and requirements that the Department be notified of certain changes.

14. Su also found an additional violation--that the financial statements filed by Respondent in April 2002 and April 2003 were false because they contain the assertion that Respondent is a registered California investments adviser. (The certificate had been revoked in February 2002.)

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[5] Respondent submitted in evidence a copy of a letter, purportedly from a Dudley Muth, Attorney at Law, dated October 3, 2003. The letter is addressed to the Department and states that an amended Form ADV regarding Respondent is enclosed. The Department, however, has no record of receiving the letter or of receiving the referenced amended Form ADV. Even if such had been submitted to the Department, it would have been received more than three years after Osterman directed it be filed. A Form ADV was received by the Department on January 10, 2005, which was signed by Gary Shemano on an illegible date in January, 2005—its relevance is therefore very limited.

15. Registered California investment advisers are subject to examinations of their books and records pursuant to Corporations Code section 25241 and its corresponding regulations. Section 25241 provides in pertinent part:

> (a) Every . . . investment adviser licensed under Section 25230 shall make and keep accounts, correspondence, memorandums, papers, books and other records and shall file financial and other reports as the commissioner by rule requires . . .
>
> . . . .
>
> (c) All records referred to in this section are subject at any time and from time to time to reasonable periodic, special, or other examinations by the commissioner . . . as the commissioner deems necessary or appropriate in the public interest or for the protection of investors.

16. Title 10, California Code of Regulations section 260.241.3 corresponds to Corporations Code section 25241. The regulation describes the books and records that investment advisers are required to maintain. In pertinent part, it provides:

> (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.
>
> (2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.
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> . . . .
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> (4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.
>
> . . . .
>
> (6) All trial balances, financial statements, worksheets . . . and internal audit working papers relating to the business of such investment adviser.

17. When examined by Department representatives in 2003, Respondent was out of compliance with the books and records requirements imposed upon licensed investment advisers. Respondent failed to provide the requisite books and records for the time period requested, including: a journal; a ledger; all check books, all bank statements, all canceled checks and cash reconciliations; and all trial balances, financial statements, worksheets and internal audit working papers.

SPECIAL REQUIREMENTS WHERE POWER OF ATTORNEY IS HELD

18. Corporations Code section 25237 directs the Commissioner to prescribe rules for investment advisers who have custody of clients' securities or funds or who have a power of attorney authorizing them to execute transactions. Accordingly, title 10, California Code of Regulations section 260.237.1, subdivision (a)(2), provided:[6]

> If the investment adviser has any power of attorney from any investment advisory client to execute transactions and does not have regular or periodic custody or possession of any of its investment advisory clients' securities or funds, except the receipt of prepaid subscriptions for periodic publications, or other investment advisory services, it shall at all times have and maintain tangible net capital of not less than $5,000.

In order to verify compliance with the above requirements, title 10, California Code of Regulations, section 260.241.3, subdivision (j), states:

> Any investment adviser who is subject to the minimum capital requirements of Section 260.237.1 . . . shall, in addition to the records otherwise required under this section, maintain a record of the proof of money balances of all ledger accounts in the form of trial balances and a record of the computations of net capitals and aggregate indebtedness pursuant to Section 260.237.1 of these rules . . . (as of the trial balances date). The trial balances and computations shall be prepared currently at least once a month.

19. There is an exception to the above-stated requirements. The Department recognizes and follows an exception allowed by policy of the Security and Exchange Commission (SEC). To qualify for such exception an investment adviser must demonstrate that the six tests set forth in the SEC-PIMS No Action letter (PIMS) are satisfied.

As set forth in Findings 9 and 10, following the 2000 examination, Osterman relied on Mankin's representations that PIMS was satisfied when he found Items I and II "resolved." Department representatives made no such representation following the 2003

[6] The regulation was in effect until January 1, 2005.

examination, and the evidence demonstrated that Respondent does not qualify for an exemption from the requirements. Although Mankin testified, similarly to his letter in 2000, that Respondent does meet the PIMS tests, there was no significant evidence corroborating his representations.

20. It is therefore determined that, when examined by Department representatives in 2003, Respondent was out of compliance with requirements imposed upon licensed investment advisers who hold powers of attorney for clients. Respondent failed to provide documents, for the period requested, containing monthly trial balances and monthly computations of net capital and aggregate indebtedness.

Neither the one-page spreadsheet for the year ending December 31, 2002, sent by facsimile to the Department from Mankin on July 24, 2003, nor a second spreadsheet sent subsequently, are sufficient to satisfy this requirement. Although both provide some computations of net capital, the documents contradict each other and are clearly not the types of records required by the law.

REQUIREMENTS TO PROVIDE CURRENT INFORMATION

21. Licensees are required to keep the Department updated regarding pertinent information concerning their business operation. Title 10, California Code of Regulations section 260.241.4, subdivision (a), states:

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

22. As set forth in Finding, Respondent failed to advise the Department of changes, including a change of address. In aggravation, it failed to do so following a specific directive from the Department (Osterman's letter of July 31, 2000) that such should be done within a ten-day period.

23. The Department alleges that the Department was not kept abreast of the location of Respondent's books and records in 2003. The evidence offered, that is, the testimony of Su, Mankin and McDonough, was unclear. There were, by all accounts, very little in the way of records and it may have been the case that Mankin had duplicates of some of the documents. Certainly, Respondent's record keeping "system" was poor. In any event, insufficient evidence was presented to demonstrate that Respondent failed to notify the Department of a change in the location of its books and records during the 2003 time period.

REVOCATION OF CERTIFICATE

24. Investment advisers are required to pay an annual renewal fee to the Department. Respondent failed to pay the 2002 fee ($125) by the renewal deadline in December 2001. On February 15, 2002, the Commissioner issued an Order Summarily Revoking Certificate. The Order was sent to Respondent along with a letter advising that the investment adviser certificate had been revoked for failure to pay the renewal fee and that the certificate was required to be surrendered. The letter also states that the order revoked Respondent's:

> . . . authority to conduct any investment advisory service in this state. These services include, but are not limited to investment supervisory services, portfolio management, financial planning . . . . If the subject is presently conducting any investment advisory services, the subject must immediately cease such activities.

The reason for the failure to pay the fee was that the employee responsible for payment had left the company and her replacement, Michael McDonough, was unaware that such a fee was required to be paid. Respondent was notified again of the revocation following the filing of its 2002 statements with the Department. The Department wrote Respondent a letter, dated April 10, 2003, advising Respondent that its certificate had been revoked. This communication was apparently given to McDonough to handle and he subsequently learned that merely submitting the renewal fee was not sufficient–in fact, reapplication for licensure was required.

UNLAWFUL CONDUCT OF INVESTMENT ADVISOR BUSINESS

25. Corporations Code section 25230 makes it unlawful to act as an investment adviser without first obtaining a certificate from the commissioner authorizing the activity. Respondent's certificate was revoked in 2002, and yet, Respondent continued to act as an investment adviser. Respondent acted as an investment adviser, without being licensed to do so, from February 15, 2002, until, at least, the date of the hearing of this matter. Why Respondent did not take definitive steps to remedy the problem was left unexplained.

FAILURE TO SURRENDER CERTIFICATE FOLLOWING REVOCATION

26. Corporations Code section 25244 states:

> Any person whose certificate as a investor adviser has been suspended or revoked shall immediately surrender such certificate to the commissioner.

Respondent did not surrender its investment adviser certificate to the Commissioner following the revocation of the certificate in 2002.

FALSE STATEMENTS TO THE COMMISSIONER

27. 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 . . . .

28. Respondent asserts a violation of this section was not shown because "no evidence was presented to prove that [Respondent] 'willfully' made any untrue statement of material fact." The word "willfully" does not in this context require that it be shown that a person intentionally made an untrue statement. The meaning provided in Penal Code section 7, subdivision 1, is instructive in licensing matters[7] as well as in the criminal context:

> The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

29. Accordingly, it is determined that Respondent willfully made the following three untrue statements to the Commissioner:

On June 14, 2002, April 7, 2003 and April 20, 2004, Respondent filed financial statements with the Commissioner that contained the representation that Respondent was a registered investment adviser in California. The statements were signed by Gary J. Shemano in his capacity as President, and he certified the information contained therein was correct.

30. Complainant argues in his closing brief that Respondent made additional false statements in filings with the Commissioner. Some of the allegations are alleged to have occurred as early as Respondent's initial application (Form ADV) filed in 1994. Others are alleged to have been made in the Form ADV filed by Respondent on January 10, 2005. The allegations are not made in Complainant's charging documents. Findings regarding the allegations would violate Respondent's due process right to fair notice. Therefore, no findings are made regarding the additional allegations of false statements.

ALLEGATIONS RE FRAUDULENT ACTS

31. Corporations Code section 25235, in part, provides:

> It is unlawful for any investment adviser, directly or indirectly, in this state:

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[7] *Pittenger v. Collection Agency Licensing Bureau* (1962) 208 Cal.App. 2d 585; and see: *Brown v. State Department of Health* (1978) 86 Cal.App. 548, 554.

(a) To employ any device, scheme, or artifice to defraud any client or prospective client.

(b) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any client or prospective client.

32. Complainant alleges that Respondent's failure to disclose its lack of licensure and the order to cease licensed activities constituted an "artifice or course of business to defraud clients and prospective clients." There was no evidence that Respondent's failings rose to the level of a fraudulent scheme as described by Corporations Code section 25235, subdivision (a), or as fraud is commonly understood. As to subdivision (b), although it can be imagined that continual operation without licensure could operate as a fraud in certain circumstances, the evidence did not demonstrate that the violations committed by Respondent constituted a transaction or a continuing practice.

ALLEGATIONS RE: MISREPRESENTATIONS IN CONNECTION WITH SALES

33. Corporations Code section 25401 provides:

It is unlawful for any person to offer or sell a security ... by means of any ... 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 light of the circumstances under which they were made, not misleading.

Complainant alleges that Respondent made multiple representations and/or omissions of material facts by virtue of its operations without a current license and its violations of statutes and regulations. Complainant did not demonstrate a connection of any material significance between the acts and omissions with the offer or sale of securities. Therefore, no violation of section 25401 is found.

"ALTER EGO" THEORY

34. Complainant argues that Respondent is the "alter ego" of Gary Shemano and that its corporate form should therefore be disregarded. Irrespective of the merits of such a theory, no basis or purpose for such a finding is discernable in the record. Consequently, no finding is made.

REQUEST FOR ANCILLARY RELIEF

35. Corporations Code section 25254, subdivision (a), provides:

If the commissioner determines it is in the public interest, the commissioner may included 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.

Complainant alleges that restitution of the investment advisory fees paid to Respondent during the time that Respondent was unlicensed should be ordered. It is also alleged that Respondent's clients/investors are entitled to such relief, as well as to the recovery of any loss of principal and interest the clients/investors suffered during the unlicensed period. The law requires, however, that these sums be awarded on "behalf of the persons injured." No evidence was presented from a person claiming injury; instead, Complainant attempts to estimate losses. For example, Complainant asserts that "it appears investor [Diane] Meiswinkle lost at least $10,183 in principle the year ending December 31, 2002." Complainant also argues that Respondent's presentation was disjointed, confusing and lacking in candor, resulting in a lack of clarity as to what losses investors may have suffered. In other words, Complainant seeks restitution on behalf of persons injured, without demonstrating such persons believe themselves injured—and, further, Complainant is unclear as to the amount it seeks to restore to the allegedly injured persons, and seeks to blame Respondent for the lack of clarity.

Insufficient evidence was presented upon which to base either an order of restitution or an order that management fees be disgorged.

COST RECOVERY

36. Corporations Code section 25256, subdivision (b), provides:

> In an administrative action brought under this part, the commissioner is entitled to recover costs, which in the discretion of the administrative law judge may include an amount representing reasonable attorney's fees and investigative expenses for the services rendered . . . .

37. The Department certified the following cost expenditures in connection with this matter:

a. Investigative expenses: $ 9,016

b. Attorney's fees: $ 40,366

c. Witness expense reimbursement: $80 (estimate)

d. Copies, postage, delivery expenses, travel costs and parking: $100 (estimate)

38. Respondent did not dispute the "reasonableness" of the claimed costs, per se, or that they were incurred. Respondent argues that no costs should be ordered because Respondent "was required to spend tens of thousands of dollars defending itself against baseless accusations." This, of course, is not correct. Violations were committed and the Department is entitled to cost recovery.

The estimates for witness expenses and costs associated with the hearing do not appear to be included within the statutory language allowing the recovery of "attorney's fees and investigative expenses" and are therefore disallowed. And given that the Department did not prove all of the allegations, particularly the most serious, it is appropriate to reduce the amount significantly.[8]

All things considered, it is determined that $24,000 is a reasonable amount to require Respondent to pay for the investigation and prosecution of this matter.

DISCUSSION

39. It is understood that Respondent's activities as an investment adviser are very limited. But this means that the books and records requirements are very easy to satisfy. It is not a defense to regulatory violations that the investment adviser business is a small one.

Respondent admitted failing to renew its investment adviser certificate, claiming that it was an inadvertent mistake. Similarly, it was claimed that the false statements on the filings with the Commissioner were not intentional. Respondent continued to assert lack of intent, even after receipt of notices from the Department that included a notice of revocation. Respondent claims, in general, no intent to violate any laws or regulations.

Other than the claims of inadvertence early on, Respondent's position was difficult to discern and to understand. It was understandable that Respondent relied upon Osterman's letter following the 2000 examination. What made no sense was Respondent's failure to act when undisputed facts—like its lack of licensure—were brought to its attention. Also left unexplained was the failure to file an amended Form ADV after being directly advised to do so.

LEGAL CONCLUSIONS

1. Cause to make final the Commissioner's Order to Respondent Shemano Capital Management to Discontinue Violations, signed October 22, 2003, exists by reason of the matters set forth in the Factual Findings.

2. Corporations Code section 25252 authorizes the Commissioner to issue an order levying administrative penalties against any investment adviser for willful violations of

[8] *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32; and see: *Hensley v. Eckerhart* (1982) 461 U.S. 424.

any of the securities laws or regulations. The amounts are as follows: No more than $5,000 for the first violation; no more than $10,000 for the second violation; and no more than $15,000 for each subsequent violation.

Cause exists to levy administrative penalties pursuant to Corporations Code section 25252. The amounts levied are based upon a consideration of the statutory maximums, the amounts originally ordered by the Commissioner (see Finding 4), and all of the facts and circumstances demonstrated by the evidence.

3. Cause to levy administrative penalties pursuant to Corporations Code section 25252 as that section interacts with title 10, California Code of Regulations, section 260.241.3, subdivisions (a)(1), (2), (4) and (6) exists by reason of the matters set forth in Factual Findings 12-17.

An appropriate penalty is $750 for each violation (of subdivision (a)) for a total of $3,000.

4. Cause to levy administrative penalties for violations of Corporations Code section 25252 as that section interacts with title 10, California Code of Regulations, section 260.241.3, subdivisions (j) exists by reason of the matters set forth in Factual Findings 18-20.

An appropriate penalty is $750.

5. Cause to levy administrative penalties for violations of Corporations Code section 25252 as that section interacts with title 10, California Code of Regulations, section 260.241.4, subdivision (a) exists by reason of the matters set forth in Factual Findings 21 and 22.

An appropriate penalty is $5,000.

6. Cause to levy administrative penalties for violations of Corporations Code section 25252 as that section interacts with section 25230 exists by reason of the matters set forth in Factual Findings 24 and 25.

An appropriate penalty is $5,000.

7. Cause to an levy administrative penalty for a violation of Corporations Code section 25252 as that section interacts with section 25244 exists by reason of the matters set forth in Factual Finding 26.

An appropriate penalty is $1,500.

8. Cause to levy administrative penalties for violations of Corporations Code section 25252 as that section interacts with section 25245 exists by reason of the matters set forth in Factual Finding 27-29.

An appropriate penalty is $5,000 for each violation for a total of $15,000.

9. Cause to require Respondent to pay cost recovery to the Department in the amount of $24,000 exists pursuant to Corporations Code section 25256, subdivision (b), by reason of the matters set forth in Factual Findings 36 though 38.

ORDERS

1. The Order to Discontinue Violations, signed by the Commissioner of Corporations on October 22, 2003,[9] is final.

2. Respondent shall pay administrative penalties totaling $30,250 to the Department of Corporations within 30 days of the effective date of this decision.

3. Respondent shall pay cost recovery in the amount of $24,000 to the Department of Corporations within 30 days of the effective date of this decision.

DATED: April 20, 2005

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

[9] The Order is incorporated in full herein by this reference.