

BEFORE THE
DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION
STATE OF CALIFORNIA

In the Matter of:

COMMISSIONER OF BUSINESS OVERSIGHT,

Complainant,

v.

BELA CAPITAL, LLC,

Respondent.

Agency No. 143878

OAH No. 2020030213

NOTICE OF ADOPTION OF PROPOSED DECISION

The attached proposed decision of the Administrative Law Judge was received by the Department of Financial Protection and Innovation ("Department;" formerly the Department of Business Oversight) on September 24, 2020. The Department did not take any action pursuant to Government Code section 11517, subparagraphs (c)(2)(A) to (E), within 100 days of receipt of the proposed decision. Therefore, as of January 2, 2021, the proposed decision was deemed adopted pursuant to Government Code section 11517, paragraph (c)(2).

DATED: March 8, 2021

/s/

MANUEL P. ALVAREZ

Commissioner of Financial Protection and Innovation



**BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA**

In the Matter of:

THE COMMISSIONER OF BUSINESS OVERSIGHT, Complainant

v.

BELA CAPITAL, LLC, an entity,

Respondent

CRD No. 143878

OAH No. 2020030213

PROPOSED DECISION

Matthew Goldsby, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 18-19 and 25, 2020, in Los Angeles, California.

Alexander M. Calero, Senior Counsel with the Department of Business Oversight (Department), and Taylor Herrlinger, Counsel with the Department, appeared and represented complainant Manuel P. Alvarez, Commissioner of Business Oversight (Commissioner).

Jaysen McCleary (Chief Compliance Officer), the managing member of respondent Bela Capital LLC, appeared and represented respondent.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 25, 2020.

FACTUAL FINDINGS

Background and Jurisdictional Facts

1. Respondent holds an investment adviser certificate issued by the Commissioner and is subject to the Financial Code and the Corporate Securities Law of 1968 (Corp. Code, § 25000 et seq.)

2. Respondent has a principal place of business at 4807 Kingman Blvd., Des Moines, Iowa 50311 (Kingman Property), telephone number (515) 557-0660. Respondent's email address is jaysenmcclary@gmail.com.

3. Respondent is organized as a limited liability company. On April 13, 2010, respondent filed a Certificate of Formation in the State of Delaware. The certificate became forfeited on October 10, 2013, for failure to designate a registered agent. (Ex. 31.) Respondent is currently registered as a limited liability company with the State of Iowa.

4. Other than its Chief Compliance Officer, respondent has no employees and currently has no clients. Respondent currently has no assets under management but is authorized to conduct business as an investment adviser in California by virtue of the certificate issued by the Commissioner pursuant to Corporations Code section 25230.

5. In 2014, the Chief Compliance Officer suffered a serious head injury and went to Montana for rehabilitation treatment. He currently resides at 1763 Red Crow Road, Victor, Montana, 59875 (Red Crow Property). Respondent maintains the Kingman Property as its principal place of business, and has mail forwarded by the post office to the Red Crow Property.

6. Respondent has no website. Respondent previously had a GoDaddy account for the domain name www.belacapital.com, but on a date not established by the evidence, the account lapsed for failure to pay the renewal charges.

7. Respondent's Chief Compliance Officer is currently registered as an investment advisor with the Financial Industry Regulatory Authority, Inc. (FINRA), a private corporation that acts as a self-regulatory organization. On April 23, 2009, FINRA suspended the registration "for failure to comply with an arbitration award or settlement agreement or to satisfactorily respond to a FINRA request to provide information concerning the status of compliance." (Ex. 13, p. 273.) The suspension was "lifted April 20, 2010." (Ex. 14, p. 269.)

Compliance Requirements for Investment Advisors

8. Generally, an investment adviser must first apply for and secure from the Commissioner a certificate to be authorized to conduct business in California as an investment advisor. (Corp. Code, § 23230.) An out-of-state investment adviser registered under Section 203 of the Investment Advisers Act of 1940 is not required to obtain a certificate if (1) the investment adviser does not have a place of business in California and (2) during the preceding 12-month period has had fewer than six clients who are residents of this state. (Corp. Code, §§ 23231.1, subd. (a), and 23202.) However, any investment adviser, or any person who contemplates becoming an

investment adviser, may apply for a certificate to act as an investment adviser by filing an application with the Commissioner. (Corp. Code, §§ 23231.)

9. The application for a certificate as an investment adviser is made by completing Form ADV in accordance with the form instructions and by filing the form with the Investment Advisor Registration Depository (IARD) for transmission to the Commissioner. (Cal. Code Regs., tit. 10, §§ 260.231, subd. (a), see also Ex. 10.) Form ADV requires the disclosure of information deemed necessary or appropriate in the public interest or for the protection of investors, including but not limited to identifying information about the licensee's business (Part 1A, Item 1), its form of organization (Part 1A, Item 3), disclosures of disciplinary history (Part 1A, Item 11), and other state registrations (Part 1B, Item 1). Form ADV requires the signer to certify that all information reported in the Form ADV is true and correct.

10. Once licensed, an investment adviser is required to file an annual updating amendment to Form ADV each year within 90 days after the end of the investment advisor's fiscal year. (Cal. Code Regs., tit. 10, § 260.241.4, subd. (e), see also Ex. 10.)

11. In addition to the annual updating amendment, a licensed investment adviser is required to amend Form ADV "promptly" if any information provided at Part 1A, Items 1, 3, or 11 of Form ADV "becomes inaccurate in any way."¹ (Ex. 10, Cal. Code

¹ Information provided at other parts and items of the Form ADV must be changed if the information becomes "materially inaccurate." (Ex. 10, emphasis in original.) None of those parts or items in the Form ADV are at issue in this case.

Regs., tit. 10, § 260.241.4, subd. (a).) The amendment must set forth the changed information. (Cal. Code Regs., tit. 10, § 260.241.4, subd. (a).)

12. Effective January 1, 2019, Financial Code section 331.5 requires all Department licensees, including licensed investment advisers, to “establish and maintain an electronic service address designated for receiving communications and documents that are sent by the commissioner to licensees.” (Fin. Code, § 331.5, subd. (a).)

13. On December 21, 2018, the Department notified all licensees of the enactment of Financial Code section 331.5 by electronic mail at the electronic mail address on record for each licensee. At the time, respondent’s email address on record was invalid as described at Factual Finding 15. Accordingly, respondent did not receive the notification.

History and Status of Compliance

14. Respondent filed an initial Form ADV on January 20, 2009, and the Commissioner issued respondent a certificate to act as an investment adviser in California. Respondent thereafter filed annual updating amendments for 2010 and 2011.

15. On February 15, 2012, respondent filed Form ADV and reported that his electronic mail address was “belacapital@ymailo.com.” (Ex. 33, p. 055.) The disclosed email address was invalid because it contained a typographical error. During the hearing, respondent’s Chief Compliance Officer testified that he did not know about the inaccuracy because he relied on a compliance firm to file the Form ADV and he did not “double-check their work.”

16. On January 29, 2015, respondent filed a Form ADV and continued to report that his electronic mail address was "belacapital@ymailo.com." (Ex. 17, p. 055.) Although the information about his email address was inaccurate, respondent failed to correct the inaccuracy. During the hearing, respondent's Chief Compliance Officer testified that he discontinued using the compliance firm in 2014, that he did not know who filled out the January 29, 2015 Form ADV, and that he did not notice the inaccurate email address or intentionally put the wrong information on the form.

17. On April 19, 2019, the Commissioner sent a notice to respondent that it had failed to file annual updating amendments for the fiscal years ending 2015, 2016, 2017, and 2018 in violation of the law and regulations. The notice warned respondent that the failure to file an annual updating amendment by April 27, 2019 could result in disciplinary action against the investment adviser certificate issued to respondent. The April 19, 2019 notice was addressed to respondent at the Kingman Property and sent by certified mail with return receipt requested. The notice was returned to the Commission by the post office as "unclaimed unable to forward." (Ex. 21.)

18. Respondent did not file another Form ADV until February 25, 2020. As pertinent to this matter, the Form ADV filed on February 25, 2020, contained the following information:

A. As its principal place of business, respondent inserted the Kingman Property and the telephone number previously furnished.

B. As its mailing address, respondent designated the Red Crow Road Property.

C. As its email address, respondent deleted the invalid email address described above and inserted jaysenmccleary@gmail.com.

D. Respondent added that other activities conducted at the Red Crow Property included the practice of law.

E. Respondent reported "HTTP://WWW.BELACAPITAL.COM" as its website address. (Ex. 19.)

F. Respondent reported that it was organized under the laws of Delaware.

G. Respondent reported that its fiscal year ends in December each year.

H. Part 1A, Item 11, section E(4), required disclosure in response to the following question: "Has any self-regulatory organization or commodities exchange ever: [1] disciplined you or any advisory affiliate by expelling or suspending you or the advisory affiliate, barring or suspending you or the advisory affiliate from association with other members, or otherwise restricting you or the advisory affiliate's activities?" (Ex. 19, p. 0153.) Respondent answered, "No."

I. At Part 1B, Item 1, respondent reported that it registered or was applying to register in Missouri.

19. During the hearing, respondent's Chief Compliance Officer expressed that respondent seeks to comply with its reporting requirements and that he would file an amended Form ADV promptly upon being notified specifically of the alleged inaccuracies. Respondent filed repeated prehearing motions to dismiss this proceeding, as well as motions to dismiss the Summary Revocation action, on the grounds that complainant failed to state specifically what is inaccurate in his Form ADV.

20. On July 6, 2020, counsel for complainant provided respondent by email with a list of disclosures on the February 25, 2020 Form ADV believed to be inaccurate. The list of alleged inaccuracies included the addresses reported for respondent's primary place of business and other location, the mailing address for respondent, the telephone number for respondent, contact information for the Chief Compliance Officer, the website for respondent, the state in which respondent is registered, the failure to disclose that FINRA suspended the registration of the Chief Compliance Officer on April 23, 2009, and the disclosure that respondent was registered or applying to register in Missouri. (Ex. 30.)

21. On August 17, 2020, respondent filed two successive Forms ADV, setting forth the following changes as it pertains to this action: (A) Respondent deleted "HTTP://WWW.BELACAPITAL.COM" as its website address and reported that it does not have a website or an account on a publicly available social media platform; and (B) Respondent reported that it was a limited liability company organized under the laws of Iowa. Respondent continued to report the Kingman Property as its primary place of business and the Red Crow Property as its other location. Brett O'Sullivan, a corporation examiner with the Department, testified that he had tried to verify the reported telephone number by dialing the number twice, but his testimony was insufficient to establish that the reported telephone number was inaccurate. Both filings on August 17, 2020 continued to report that no affiliate of respondent had been suspended by any self-regulatory organization and that respondent was registered or applying to register in Missouri.

22. On August 19, 2020, respondent filed an amended Form ADV, which incorporated modifications recommended during the testimony of Mr. O'Sullivan, except respondent did not change the disclosure regarding the suspension of the

Chief Compliance Officer's registration with FINRA at Part 1A, Item 11, section E(4). Respondent argued that the FINRA suspension "should never have happened and should not be on [the Chief Compliance Officer's] record" because it was based on the failure to pay an arbitration award that was discharged by a bankruptcy filing; however, because bankruptcy counsel did not give notice to the interested parties and subsequently died, FINRA suspended the registration based on the unpaid obligation. (Ex. 30.) Respondent further argued that FINRA would remove the suspension from its records if the Chief Compliance Officer had "time or energy to expunge it." (*Id.*) Notwithstanding the absence of any documents or legal authority to support the argument for respondent's disclosure, the allegations supporting the argument are insufficient to alter the essential facts: FINRA suspended the registration of respondent's Chief Compliance Officer on April 23, 2009, and did not lift the suspension until April 20, 2010. Accordingly, respondent's representation that the Chief Compliance Officer's registration was never suspended is not only inaccurate, it is a false statement of a material fact.

23. In addition, the Chief Compliance Officer testified that respondent never applied or intended to register in Missouri, that on Form ADV he checked the box next to "MO" believing it to be the postal service abbreviation for Montana, that it was a mistake, and that he corrected it as soon as it was pointed out. Mr. O'Sullivan testified that he "looked up and saw" that the disclosure to register in Missouri was withdrawn. However, respondent's most recent filings on August 17, 2020 (Exs. 35 and 36) and on August 19, 2020 (Ex. C) each report at Part 1B, item 1, that respondent is registered or intends to apply for registration in Missouri. (Ex. C.)

Procedural History

24. On May 22, 2019, Mary Ann Smith, acting in her official capacity as Deputy Commissioner of the Enforcement Division for the Commissioner, issued an Order Summarily Revoking Investor Advisement Certificate (Summary Revocation) and complainant filed a Request to Set Hearing in OAH case number 2019070913. The Summary Revocation, as amended on November 19, 2019, included the following factual allegations:

2. On or about October 2, 2018, the Commissioner sent an online examination to [respondent] at the email designated by [respondent] on the [IARD] The Commissioner informed [respondent] that the online examination must be completed and submitted by November 16, 2018.
3. The Commissioner sent four emails . . . at [respondent's] designated email address, reminding [respondent] of the November 16, 2018 deadline to complete and submit the online examination.
4. Despite the Commissioner's efforts, [respondent] failed to timely complete and submit the online examination by the November 16, 2018 deadline. . . .
5. [Respondent's] fiscal year ends in December of each calendar year.
6. On or about April 17, 2019, the Commissioner sent a notice to [respondent] at the email address and mailing

address designated by [respondent] on IARD, advising respondent to file its annual updating amendment to [Form ADV] with IARD by April 27, 2019. The Commissioner informed respondent that failure to file the annual updating amendment to Form ADV will result in summary revocation of [respondent's] investment advisor certificate.

7. Despite the Commissioner's efforts, [respondent] failed to file the annual updating amendment to Form ADV by the April 27, 2019 deadline. . . .

(Ex. H.)

25. Respondent filed a timely request for hearing and the matter was set for hearing on January 8-9, 2020.

26. On September 25, 2019, complainant issued a subpoena requesting the testimony of respondent's Chief Compliance Officer at the January 8, 2020 hearing. The subpoena was sent via certified mail, return receipt requested, addressed to the Kingman Property. The subpoena was returned to complainant by the post office, marked as "attempted – not known - unable to forward." (Ex. 21.)

27. On respondent's motion, OAH continued the January 8-9, 2020 hearing to March 5-6, 2020.

28. On March 2, 2020, three days before the scheduled hearing, the Commissioner rescinded the Summary Revocation, as amended, and filed a request to take the matter of the Summary Revocation off calendar. On March 4, 2020, OAH

issued an order vacating the hearing dates and closing the matter filed in OAH case number 2019070913.

29. On March 2, 2020, Mary Ann Smith, acting in her official capacity as Deputy Commissioner of the Enforcement Division for the Commissioner, issued an Order to Discontinue Violations Pursuant to Corporations Code section 25249 (Order to Discontinue). The Order to Discontinue was directed to respondent and alleged violations of the following sections of the Financial Code and Corporate Securities Law of 1968:

A. Financial Code section 331.5 by failing to maintain an email address to receive communications and documents that are sent by the Commissioner and failing to notify the Commissioner of a change in its email address;

B. Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, subdivisions (a) and (d), by failing to maintain updated information in Form ADV with the IARD; and

C. Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, subdivisions (a) and (d), by failing to timely file annual updating amendments to Form ADV with IARD.

30. Respondent filed a timely Notice of Defense. On March 4, 2020, complainant filed with OAH a request to set the Order to Discontinue for hearing in this case number. The matter was set for hearing on March 23-24, 2020.

31. On March 16, 2020, complainant issued a subpoena requesting the testimony of respondent's Chief Compliance Officer at the March 23, 2020 hearing. The subpoena was sent via certified mail, return receipt requested, addressed to both

the Kingman Property and the Red Crow Property. The subpoena sent to the Red Crow Property was returned to complainant by the post office. (Ex. 23.)

Other Considerations

32. Except as described hereinabove, respondent has no history of license discipline with the Department.

33. Respondent's Chief Compliance Officer has a long history of success in the financial industry, earning commendations and recognition as a top investment professional from Smith Barney Citigroup and Eaton Vance Distributors, Inc. (Ex. H.)

34. There is no evidence of actual harm to any consumer.

LEGAL CONCLUSIONS

Burden of Proof

1. These administrative proceedings are governed by the provisions of the Administrative Procedure Act. (Gov. Code, §§ 11500 et seq., Corporations Code section 25251, subd. (a).)

2. The standard of proof to be used in these proceedings is a preponderance of the evidence. (Evid. Code, § 115.) Accordingly, complainant has the burden to produce substantial evidence, contradicted or uncontradicted, which supports the finding. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.)

Due Process

3. Respondent argued that the Order to Discontinue must be dismissed because complainant failed to give proper notice. Respondent expressed willingness to comply with its reporting and disclosure requirements, but argued that it was denied due process because complainant failed to allege specifically the information or data in respondent's Form ADV claimed to be inaccurate.

4. Respondent requested reconsideration of the order dated June 15, 2020, denying respondent's pre-hearing Motion for a More Specific Claim etc. (Ex. G) Reconsideration of a matter that has been previously decided is authorized if the request for reconsideration presents new or different facts, circumstances or law. At hearing, both parties were presented additional facts, circumstances, or law not fully considered at the time of the prehearing motions. However, the additional facts and circumstances established at hearing only serve to affirm the prior ruling.

5. A pleading under the APA must "set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his or her defense. It shall specify the statutes and rules that the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of those statutes and rules." (Gov. Code, § 11503, subd. (a).)

6. In the Order to Discontinue, complainant alleged that respondent was "failing to maintain an updated electronic service address for receiving communications and documents that are sent by the Commissioner" in violation of Financial Code section 331.5. (Ex. 1.) The statement in support of the Order to Discontinue described the Commissioner's efforts to email respondent the notice to

comply with the law and regulations, and respondent's failure to act in response to those efforts. (Ex. 2.) Respondent knew or reasonably should have known that that his email of record was invalid due to a typographical error from January 1, 2019, to February 25, 2020. Accordingly, the allegation was sufficiently specific to enable respondent to prepare a defense.

7. In the Order to Discontinue, complainant alleged that respondent was "failing to maintain updated information in Form ADV" in violation of Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4. (Ex. 1.) Respondent knew or reasonably should have known that the Form ADV filed on February 25, 2020 was inaccurate in many respects, including but not limited to the facts established at hearing that it was reporting a website that was no longer active, that it was not validly registered in the State of Delaware, that FINRA had suspended the registration of its Chief Compliance Officer for almost one year beginning April 23, 2009, and that it was not registered or applying to be registered in the State of Missouri. Accordingly, the allegation was sufficiently specific to enable respondent to prepare a defense.

8. In the Order to Discontinue, complainant alleged that respondent was failing to file annual updating amendments to its Form ADV in violation of Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4. Respondent knew or reasonably should have known that it had not filed a Form ADV for the years 2015 through 2018. Accordingly, the allegation was sufficiently specific to enable respondent to prepare a defense.

9. Respondent has failed to establish that complainant failed to give notice as required by law. Accordingly, the motion for reconsideration is denied and the matter will not be dismissed for inadequate notice or lack of due process.

Claim or Issue Preclusion

10. Respondent argued that complainant is barred from enforcing the Order to Discontinue under the doctrine of res judicata because the claims alleged in the Order to Discontinue could have and should have been raised in the Summary Revocation action in OAH case number 2019070913. Respondent argued that, by voluntarily dismissing the Summary Revocation action on the eve of the scheduled hearing in that case, complainant is precluded from filing the Order to Discontinue proceeding based on the same or similar facts.

11. The doctrine of res judicata describes the preclusive effect of a final judgment on the merits and prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. (*Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 731.) To operate as a bar, a judgment must be final, on the same claim or cause of action, between the same parties, and must be an adjudication on the merits. (*McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 794.)

12. In *Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 731, the court explained:

“Causes of action are considered the same if based on the same primary right.” (Citation omitted.) “[T]he primary right is simply the plaintiff’s right to be free from the particular injury suffered.” (Citation omitted.) “Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek

compensation for the same harm, they generally involve the same primary right." (Citation omitted.)

13. Moreover, even where the causes of action are different in the subsequent action, the doctrine may render conclusive those matters which were decided by the first judgment. If a matter was within the scope of the first action and "could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202 emphasis in original.)

14. In this case, the parties are the same. Accordingly, privity is established between the two proceedings. Although the level of discipline sought in the Order to Discontinue is different and less severe than the discipline sought in the Summary Revocation Order, the causes for discipline are essentially the same in both matters because they are based on the same primary right, specifically the public's right to have access to complete, timely and accurate disclosures and information about investment advisors licensed in California. Moreover, the Commissioner could have sought two alternative levels of discipline in one action or amended the Summary Revocation to prevent relitigation of the same cause for discipline.

15. However, the Summary Revocation matter did not result in a final judgment on the merits because complainant rescinded the Summary Revocation order and voluntarily dismissed the action. Respondent relies on federal civil procedure to assert that the voluntary dismissal of the matter on the eve of the scheduled hearing operated as an adjudication on the merits because the two orders were based on the same claim. (F.R.C.P. Rule 41(a)(1)(B).) However, the APA and not the Federal Rules of Civil Procedure govern these procedures. None of the cases cited by respondent are persuasive authority for estopping an agency from commencing

one form of disciplinary action after a voluntary dismissal of another form of discipline based on similar facts.

16. As explained in *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1290, the doctrine of res judicata generally applies to administrative proceedings, but that its application and enforcement is more flexible in these contexts in the following respects:

The key to a sound solution of problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applicable to some administrative action, that the principle should not be applicable to other administrative action, and that much administrative action should be subject to a qualified or relaxed set of rules concerning res judicata.

17. Based on the foregoing, complainant was not precluded from filing, prosecuting, and enforcing the Order to Discontinue under the doctrine of res judicata and the matter is decided on the merits as follows.

Issuance of the Order to Discontinue

18. If, after examination or investigation, the Commissioner has reasonable grounds to believe that any investment adviser has violated any law or rule binding upon it, the Commissioner must issue a written order addressed to the investment adviser, directing the discontinuance of the violation. (Corp. Code, § 25249.)

19. Although respondent is an out-of-state investment adviser with no office in California and fewer than six California clients, he chose to apply for and obtain a California investment adviser certificate. Accordingly, respondent is bound to comply with all laws and regulations applicable to licensed investment advisers.

20. Cause was shown to issue the Order to Discontinue because a preponderance of the evidence established that respondent violated Financial Code section 331.5 by failing to maintain a valid email address from January 1, 2019, to February 25, 2020.

21. Cause was shown to issue the Order to Discontinue because a preponderance of the evidence established that respondent violated Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, subdivisions (a) and (d), by failing to maintain updated information in Form ADV with the IARD. From February 15, 2012 to the current date, information that respondent provided in Form ADV became inaccurate in multiple respects and respondent failed to promptly file a Form ADV to correct those inaccuracies.

22. Cause was shown to issue the Order to Discontinue because a preponderance of the evidence established that respondent violated Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, subdivision (e), by failing timely file its annual updating amendments in 2015, 2016, 2017, and 2018.

23. Because the Financial Code and Corporations Code are binding upon respondent, the Commissioner was mandated to issue the Order to Discontinue pursuant to Corporations Code section 25249 based on these past violations.

Final Order to Discontinue

24. No order directing the discontinuance of a violation may become final except after notice to the investment adviser affected by the order of the Commissioner's intention to make the order final and of the reasons to make the order final pursuant to Corporations Code section 25251, which provides:

If, upon the conclusion of the hearing, it appears to the commissioner that the broker-dealer or investment adviser is conducting business in an unsafe and injurious manner or is violating any law of this state, or any rule binding upon it, the commissioner shall make the order of discontinuance final and the broker-dealer or investment adviser shall immediately discontinue the practices named in the order."

25. However, before the Commissioner can make the Order to Discontinue final under Corporations Code section 25251, the Commissioner must find that respondent "is conducting" business in an unsafe and injurious manner or "is violating" any applicable law or rule binding upon respondent. Unlike Corporations Code section 25249, drafted in the past tense, Corporations Code section 25251 requires evidence of a present and continuing injurious business practice or an ongoing violation of law or regulation before ordering an investment adviser to immediately discontinue the practices named in the order.

26. In the past, respondent maintained an invalid electronic service address with the Department because respondent's Form ADV filed on February 15, 2012 contained a typographical error. The inaccurate information was not corrected until respondent filed Form ADV on February 25, 2020. Nonetheless, upon the conclusion of

the hearing, the evidence established that respondent is no longer violating Financial Code section 331.5. Accordingly, cause does not exist to make the Order to Discontinue final to the extent it orders respondent to immediately discontinue the violation of Financial Code section 331.5.

27. For the years 2015 through 2018, respondent failed to file annual updating amendments. However, respondent filed an annual updating amendment on February 25, 2020, within 90 days of respondent's fiscal year end on December 31, 2019. Accordingly, upon the conclusion of the hearing, the evidence established that respondent is no longer violating Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, subdivision (e). Accordingly, cause does not exist to make the Order to Discontinue final to the extent it orders respondent to immediately discontinue violating Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, subdivision (e).

28. Respondent cured many past deficiencies during the hearing and is no longer reporting inaccurate information about its website and the state in which the organization is currently registered as a limited liability company. The evidence showing that certified mail was returned by the postal service was not persuasive evidence that the Kingman Property and Red Crow Property were inaccurately reported on respondent's Form ADV in the past. The record reveals that other notices have been sent to those addresses without being returned and the Chief Compliance Officer credibly testified that, although respondent has little or no physical presence at the Kingman Property, respondent operates out of both locations. It is equally likely

that respondent did not claim the delivery or that the postal service contributed to the failed delivery.²

29. However, respondent continues to report that none of its advisory affiliates has been suspended by any self-regulating organization when, in fact, FINRA suspended the registration of its Chief Compliance Officer for almost one year beginning April 23, 2009. Also, the weight of the evidence indicates the most recent Form ADV filed on August 19, 2020 continues to report that respondent is registered or is applying for registration in Missouri when, in fact, the disclosure is admittedly a mistake.

30. The testimony of the Chief Compliance Officer that respondent will file an amended Form ADV promptly upon being notified specifically of the inaccuracy exhibits a business practice being conducted in an unsafe or injurious manner. Public protection can only be assured if respondent diligently reviews the information

² While this evidence fails to show cause to issue a final order, respondent will bear ultimate responsibility for receiving service of process at the designated locations despite the evident problems in corresponding with respondent at those addresses. Service of an accusation by certified mail at a licensee's address on file with a regulatory agency complies with the APA and has been held to be constitutionally sufficient even though the accusation is returned to the agency by the postal service as "Returned to Sender, Unclaimed." (*Miller Family Home v. Department of Social Services* (1997) 57 Cal.App.4th 491.) Actual notice is not required. (*Ibid.* at p. 493.)

reported on its Form ADV and promptly makes changes as the information becomes inaccurate in any way, and not after the Department has discovered in the inaccuracy.

31. Accordingly, upon the conclusion of the hearing, the evidence established that respondent is conducting business in an unsafe and injurious manner and continues to violate Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, subdivisions (a) and (d). Accordingly, cause exists to make the Order to Discontinue final to the extent it orders respondent to immediately discontinue these business practices and to cease violating the law.

32. The task in disciplinary cases is preventative, protective and remedial, not punitive. (*In re Kelley* (1990) 52 Cal.3d 487.) Although respondent has no prior record of discipline and there is no evidence of actual harm to the public, making the Order to Discontinue final is not an unduly punitive level of discipline, and serves preventative, protective, and remedial purposes.

ORDER

The Order to Discontinue Violations Pursuant to Corporations Code section 25249, issued by the Commissioner against respondent Bela Capital LLC, shall become final pursuant to Corporations Code section 25251. Respondent Bela Capital LLC shall immediately discontinue violating Corporations Code section 25241 and California Code of Regulations, title 10, section 260.241.4, subdivisions (a) and (d).

DATE: September 23, 2020

/s/

MATTHEW GOLDSBY

Administrative Law Judge

Office of Administrative Hearings