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BEFORE THE DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION

OF THE STATE OF CALIFORNIA

In the Matter of: THE COMMISSIONER OF FINANCIAL PROTECTION AND INNOVATION, Complainant, v. INFINITY CAPITAL GROUP, LLC, an entity; and SHLOMO MORDECHAI BISTRITZKY, an individual, Respondents.	CRD ID: 159804 ACCUSATION AND CLAIM FOR ANCILLARY RELIEF (CORPORATIONS CODE SECTIONS 25232, 25232.1 AND 25254)

Clothilde V. Hewlett, Commissioner of the Department of Financial Protection and Innovation (Commissioner), acting to protect the public, alleges and charges as follows:

I.

Introduction

1. The Commissioner brings this action pursuant to the provisions of the Corporate Securities Law of 1968 (CSL) [1] (Corporations Code section 25000 et seq.), sections 25232, 25232.1,

[1] All further references are to the Corporations Code unless otherwise indicated.

and 25254, and accompanying regulations in California Code of Regulations, title 10, section 260.000 et seq.

2. Infinity Capital Group (ICG) is, or was, at all relevant times, a Delaware limited liability company registered with the California Secretary of State on August 8, 2011. ICG's principal place of business is located at 21700 Oxnard Street, Suite 460, Woodland Hills, California 91367. According to the California Secretary of State's website, ICG's registration is forfeited by the Franchise Tax Board as of March 1, 2022.

3. ICG is, or was, at all relevant times, an investment adviser licensed by the Commissioner since December 14, 2011 (Central Registration Depository No. 159804) pursuant to the CSL. ICG's registration status is listed in CRD as "not currently registered-failure to renew" effective December 31, 2018."

4. Shlomo Mordechai Bistritzky (Bistritzky) is, or was, at all relevant times, the chief executive officer, manager, and agent for service of process for ICG. Bistritzky has been licensed by the Commissioner as an investment adviser representative since July 25, 2011 (CRD No. 6004136).

5. According to CRD's records, ICG is directly owned by Bistritzky, Stuart Joel Greenberg (CRD No. 6004145) (Greenberg), and the entities listed below:

a) Greyrock Capital, LLC (EIN No. 45-2576837)

b) Jacrie Group, LLC (EIN No. 45-2576795)

c) Hermes Capital Management, LLC (EIN No. 45-2791476)

d) Annor Ackah (CRD No. 1992747)

6. Further ICG is indirectly owned by the following individuals:

a) Carolyn Greenberg (CRD No. 6009148). Greenberg and Carolyn Greenberg are Trustees of the Stuart and Carolyn Greenberg Family Trust, which in turn owns the Jacrie Group, LLC listed herein;

b) Bistritzky, who is a member of Greyrock Capital, LLC listed herein; and

c) Jon Javellana (CRD No. 2538653), who is a member of Hermes Capital Management, LLC.

7. At all relevant times herein, ICG Finance Fund, LP (The Fund) is, or was, a Delaware Limited Partnership incorporated on July 20, 2011, with its principal place of business located at 21700 Oxnard Street, Suite 460, Woodland Hills, California 91367.

8. At all relevant times herein, ICG is, or was, the manager of The Fund.

9. ICG and Bistritzky are hereinafter collectively referred to as "Respondents."

10. The Commissioner is authorized to administer and enforce the provisions of the CSL, and rules adopted thereunder.

11. The Commissioner brings this action seeking to revoke Respondents' investment adviser certificates pursuant to section 25232 on the basis that Respondents violated several provisions of the CSL.

12. The Commissioner further brings this action seeking to bar Bistritzky pursuant to section 25232.1, subdivisions (a) and (e) on the grounds that the bar is in the public interest and Bistritzky (i) willfully made false or misleading statements or willfully omitted to state material fact in the report filed with the Commissioner; and (ii) willfully violated provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Advisers Act of 1940.

13. The Commissioner also brings this action seeking restitution from Respondents pursuant to section 25252, subdivision (b), for the violations described herein.

II.

Statement of Facts

14. On or about March 8, 2012, Respondents filed a "Form ADV — Uniform Application Investment Adviser Registration and Report by Exempt Reporting Advisers" (ADV) with FINRA, reporting under Part 2A that they had $340,000.00 assets under their management.

15. On or about March 21, 2012, Respondents filed a Form ADV Part 1 with FINRA, stating that they have no clients or assets under their management.

16. In about December 2018, the Commissioner commenced a regulatory examination of the books and records of Respondents (2018 Examination) at Respondents' principal place of business.

17. In January and June 2019, the Commissioner received complaints from at least two

California investors, C.S. and W.R., from which it appeared Respondents may be engaged in business as investment advisers in violation of the CSL. The complaints disclosed that Respondents directly and through third parties offered and sold securities in the form of investment contracts described as "Limited Partnership Agreement" (Agreement) in The Fund.

18. On April 10, 2020, the Commissioner's examiner (Examiner) sent a letter to Respondents dated April 10, 2020, described as "General Inquiries relating to ICG Finance Fund, LP" (April Letter) requesting information about the Fund. The 2018 Examination and the Commissioner's investigation of the complaints filed by investors revealed that Respondents engaged in business as investment advisers in violation of several provisions of the CSL in the manner more fully described below.

III.

The 2018 Examination

Respondents Willfully Failed to File Form ADV Annual Updating Amendments

19. CSL 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.

(Corp. Code, § 25241, subd. (a).)

20. Cal. Code Regs., tit. 10, § 260.241.4 provides, in pertinent part:

> (a) 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.
>
> ….
> (d) A licensed investment adviser shall file changed information contained in its Form ADV with the Investment Adviser Registration Depository ("IARD") in accordance with its procedures for transmission to the Commissioner.

(Cal. Code Regs., tit. 10, § 260.241.4, subds. (a) and (d).)

21. IARD provisions require investment advisers to maintain updated information with IARD, including accurate answers to disclosure questions in Part 1, Item 11 of Form ADV. Any change to the information in Form ADV must be updated "promptly" by filing an amendment to Form ADV. (See General Instructions of Form ADV, pages 2 through 4.)

22. The 2018 Examination revealed that Respondents have neither filed an Annual Updating Amendment form since 2011, nor kept information in Form ADV, Part 1, updated, in violation of section 25241 and Cal. Code Regs., tit. 10, § 260.241.4.

Respondents Willfully Failed to Disclose Significant Events

23. The 2018 Examination showed that Respondents willfully failed to report the following significant events:

a) The quarterly investor statements investors received from Respondents identified HC Global Fund Services, LLC (HC Global) as The Fund's administrator. On or about November 1, 2018, HC Global notified Respondents in writing that it was terminating ICG's administrative services due to a material breach and Respondents' failure to provide the information or cooperation necessary for the successful performance of HC Global' services.

b) Respondents acknowledged in their response to the April Letter that they stopped providing investor statements when "the administrator was terminated," however, there is no evidence or documentation indicating that Respondents notified investors of the termination of HC Global or the reason for the termination.

c) Respondents failed to disclose a revocation Order dated April 11, 2018 (April 2018 Order) that was issued by the Commissioner against Respondents' affiliate entity, 101 Auto Funding, LLC (101 Auto). The April 2018 Order revoked 101 Auto's Finance Lender and/or Brokers License pursuant to Financial Code section 22715 for failing to file its annual report. Respondents' Confidential Private Offering Memorandum (POM) designates 101 Auto as one of the "affiliates of the General Partner" primarily responsible for "sourcing, underwriting and servicing the Partnership's investments." Bistritzky serves as the primary manager of the Fund who assists with the sourcing, underwriting, purchase, and servicing of investments in the Merchant Cash Advance Sector.

d) Respondents failed to disclose that ICG underwent foreclosure. During

the 2018 Examination, the Examiner observed a "Notice of Public Sale of Collateral" dated January 3, 2018, notifying the public of the plan of ICG's secured lender, Moriches Capital Group, LLC, to sell at a public auction all its rights, title and interest assigned to the secured lender to secure the debts and obligations of ICG, in an amount not less than $3,215,000.00.

e) In response to the April Letter, ICG's counsel of record stated that substantially all ICG's assets were foreclosed on January 28, 2018, and that investors were notified in the beginning of 2018. However, investors stated they were not informed of the foreclosure.

Respondents Willfully Failed to Ensure Clients Received Account Statements

24. Section 25235 provides, in pertinent part:

> It is unlawful for any investment adviser, directly or indirectly, in this state:
> ….
>
> (d) To engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The commissioner shall, for the purpose of this subdivision, by rule define and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

25. Cal. Code Regs., tit. 10, § 260.237 provides in pertinent part:

> (a) Safekeeping required. It is unlawful and deemed to be a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 25235 of the Code for an investment adviser … to have custody of client funds or securities unless:
>
> …
>
> (5) Special rule for limited partnerships and limited liability companies. If the investment adviser or a related person is a general partner of a limited partnership (or managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle):
>
> (A) The adviser sends to all limited partners (or members or other beneficial owners) at least quarterly, a statement showing ….
>
> (b) Exceptions.
> ….

(4) Limited partnerships subject to annual audit. An investment adviser is not required to comply with paragraphs (a)(3), and (a)(5)(B) of this section and shall be deemed to have complied with paragraph (a)(6) of this section with respect to the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle) if each of the following conditions are met:

(A) Account statements required by paragraph (a)(5)(A).

(B) At least annually the fund is subject to an audit and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) and the Commissioner within 120 days of the end of its fiscal year.

(C) The audit is performed by an independent certified public accountant that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by the Public Company Accounting Oversight Board in accordance with its rules.

(D) Upon liquidation, the adviser distributes the fund's final audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) and the Commissioner promptly after the completion of such audit.

…

(2) "Custody" means holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them, or having the ability to appropriate them. An investment adviser has custody if a related person holds directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory serv ices the investment adviser provides to clients. Custody includes:

(C) Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives the investment adviser or the investment adviser's representative legal ownership of or access to client funds or securities.

(Cal. Code Regs., tit. 10, § 260.237, subds. (a)(5)(A), and (b)(4)(A) (D).)

26. The 2018 Examination showed that ICG has custody of client funds and securities because it served as the general partner and investment adviser to The Fund. Pursuant to Cal. Code Regs., tit. 10, § 260.237, subd. (a)(2)(C), when an investment adviser serves as a general partner of a limited partnership; managing member of a limited liability company; or a comparable position for another type of pooled investment vehicle that gives the adviser legal ownership of, or access to client funds or securities, that adviser is considered to have custody of those client funds and securities. However, an investment adviser acting in this capacity will be eligible for a waiver of the heightened custody requirements of Cal. Code Regs., tit. 10, § 260.241.2 and 260.237.2 if the adviser adheres to pertinent safeguarding procedures.

27. Respondents did not adhere to the requisite safeguarding procedures in managing The Fund. Respondents did not distribute account statements to the investors of The Fund since the 2nd Quarter of 2018 and The Fund's financial statements have not been audited since 2014, in violation of violation of Cal. Code Regs., tit. 10, § 260.237(b)(4)(A).

28. Additionally, Respondents represented that they were in the process of dissolving The Fund but failed to distribute The Fund's final audited financial statements prepared in accordance with GAAP to all limited partners and the Commissioner after the completion of such audit as required under Cal. Code. Regs., tit. 10, § 260.237(b)(4)(D). As such, Respondents are not eligible to receive a waiver of the heightened custody requirements set forth in Cal. Code Regs., tit. 10, §§ 260.241.2 and 260.237.2.

<u>Willfully Failing to Maintain Books and Records</u>

29. CSL 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.

(Corp. Code, § 25241, subd. (a).)

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30. CCR section 260.241.3. provides in pertinent part:

> (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.
>
> (4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.
> (5) All bills or statements (or copies thereof), paid or unpaid, relating to the business of the investment adviser as such.
>
> (6) All trial balances, financial statements, worksheets that contain computations of minimum financial requirements required under Section 260.237.2, 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 (i) any recommendation made or proposed to be made and any advice given or proposed to be given, (ii) any receipt, disbursement or delivery of funds or securities, or (iii) the placing or execution of any order to purchase or sell any security; provided, however, that the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser; and provided that if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent, except that if such notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of such notice, circular or advertisement a memorandum describing the list and the source thereof.
>
> ….

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> (b) If a licensed investment adviser has custody or possession of securities or funds of any client, the records required to be made and kept under Subsection (a) above shall include:
>
> (4) A record for each security in which any such client has a position, which record shall show the name of each such client having any interest in such security, the amount of interest of each such client, and the location of each such security.
>
> (j) Any investment adviser who is subject to the minimum financial requirements of Section 260.237.2 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 minimum net worth pursuant to Section 230.237.2 of these
>
> rules (as of the trial balance date). The trial balances and computations shall be prepared currently at least once a month.

(Cal. Code Regs., tit. 10, § 260.241.3, subds. (a) (1), (2), (4)-(7), (b) (4) and (j).)

31. Every investment adviser is required to prepare and maintain cash receipt and disbursement journals, general ledger, balance sheet, and income statement at the end of each month. The 2018 Examination revealed that Respondents failed to maintain or provide the books and records requested by the Examiner, including:

a) failing to prepare or maintain monthly financial statements and accounting records; failing to prepare and maintain monthly minimum financial requirement calculations; and failing to provide subscription documents for the individuals and entities listed below:

- Infinity Capital Group, LLC
- M FG
- M. R.
- P M Charitable Trust
- CB CF
- C G
- CL I
- C. U.

- E. F.
- PCFBD
- EMI
- Y. G.
- D B R
- K. B.
- S. G.

b) Failed to provide copies of Schedule K-1 tax forms to investors and Profit & Loss Allocation Schedules or other documentation which confirm that profits and losses were properly allocated to the investors in The Fund for October, November, and December 2018.

c) Failed to provide ICG's liquidation plan, liquidation disbursement schedules, investor balances upon liquidation, the calculation of investor balances upon liquidation and documentation which confirms that disbursements were made to all investors.

d) Failed to provide custodial account statements, bank statements or other third-party valuation documents for each of the assets included in The Fund's December 31, 2018, Balance Sheet. In addition, ICG did not provide documentation which supports the "Bad Debt" of $635,435 and "Loss on Write-off" $864,553 reflected in The Fund's January 1, 2018, through December 31, 2018, Profit & Loss statement.

Respondents Willfully Failed to Meet the Minimum Net Worth Requirements

32. Cal. Code Regs., tit. 10, section 260.237.2 provides in pertinent part:

> (a) Every investment adviser who has custody of client funds or securities shall maintain at all times a minimum net worth of $35,000, and every investment adviser who has discretionary authority over client funds or securities but does not have custody of client funds or securities, shall maintain at all times a minimum net worth of $10,000.
>
> (c) Unless otherwise exempted, as a condition of the right to continue to transact business in this state, every investment adviser shall, by the close of business on the next business day following the discovery that the investment adviser's net worth is less than the minimum required, notify the Commissioner that the investment adviser's net worth is less than the minimum required.

> After transmitting such notice, by the close of business on the next business day each investment adviser shall file a report with the Commissioner of its financial condition….
>
> (e) For purposes of this rule, a person will be deemed to have custody if said person directly or indirectly holds client funds or securities, has any authority to obtain possession of them, or has the ability to appropriate them.
>
> (j) For purposes of subsection (c) this rule, if the failure to discover that an investment adviser's net worth is less than the minimum required is the result of the investment adviser's failure to keep true, accurate and current the books and records required under Section 260.241.3, the investment adviser will be deemed to have discovered that the investment adviser's net worth is less that the minimum required by this section.

33. The 2018 Examination disclosed that ICG has custody of client funds and securities as such, it is required to always maintain a minimum net worth of $35,000. However, due to the ICG's failure to maintain books and records and accounting records, ICG's minimum financial requirement could not be determined during the 2018 Examination. Therefore, pursuant to Cal. Code Regs., tit. 10, section 260.237., subd. (j), ICG is deemed to be deficient of the minimum net worth requirement and is deemed to have discovered that its net worth is less than the minimum net worth requirement. In addition, ICG failed to notify the Commissioner that its net worth was less than the minimum financial requirement, in violation of Cal. Code Regs., tit. 10, section 260.237.2, subd. (c).

Respondents Willfully Failed to File Annual Report

34. Cal. Code Regs., tit. 10, section 260.241.2 provides in pertinent part:

> (a) General Rule. Subject to the provisions of subsection (c) of this section, every licensed broker-dealer, and every licensed investment adviser subject to the provisions of Section 260.237.2 of these rules, shall file an annual financial report, as follows….
>
> (3) The financial statements included in the annual report shall be prepared in accordance with generally accepted accounting principles and shall be audited by either an independent certified public accountant or independent public accountant; provided, however, the financial statements need not be audited if:

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> The broker-dealer or investment adviser has not held or accepted custody of funds and securities for or owed money or securities to customers or clients during the period covered by the report; and
>
> (B) if the licensee is an investment adviser, the investment adviser only has discretionary authority over client funds or securities, the investment adviser has taken only limited powers of attorney to execute transactions on behalf of its clients, or the investment adviser does not accept prepayment of more than $500 per client for more than six months in advance; or
>
> (4) The report shall be filed not more than 90 days after the investment adviser or broker- dealer's fiscal year end….

35. Respondents are required to file an annual financial report no more than 90 days after the investment adviser or broker- dealer's fiscal year end. Further, because ICG has custody of client funds and securities, ICG is required to file annual financial reports that are prepared in accordance with GAAP and audited by an independent certified public accountant or independent public accountant. As noted in the 2018 Examination, since ICG's inception, Respondents have not filed any reports, let alone audited reports.

Engaging in Activities that do not Promote Fair, Equitable and Ethical Principles

36. CSL section 25238 provides in pertinent part:

> No investment adviser licensed under this chapter and no natural person associated with the investment adviser shall engage in investment advisory activities, or attempt to engage in investment advisory activities, in this state in contradiction of such rules as the commissioner may prescribe designed to promote fair, equitable and ethical principles.

37. Cal. Code Regs., tit. 10, § 260.238 provides in pertinent part:

> The following activities do not promote "fair, equitable or ethical principles," as that phrase is used in Section 25238 of the Code:
>
> (a) Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after

> reasonable inquiry concerning the client's investment objectives financial situation and needs, and any other information known or acquired by the adviser after reasonable examination of such of the client's records as may be provided to the adviser.
>
> (h) Misrepresenting to any advisory client, or any prospective advisory client, the qualifications of the adviser, its representatives or any employees, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service or omitting to state a material fact necessary to make the statements made regarding the qualifications, services or fees, in light of the circumstances under which they are made, not misleading.
>
> (k) failing to disclose to a client in writing before entering into or renewing an advisory agreement with that client any material conflict of interest relating to the adviser, its representatives or any of its employees, which could be reasonably expected to impair the rendering of unbiased and objective advice including:
>
> (1) Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and
>
> (2) Charging a client an advisory fee for rendering advice without disclosing that a commission for executing securities transaction pursuant to such advice will be received by the adviser, its representatives or its employees, or that such advisory fee is being reduced by the amount of the commission earned by the adviser, its representatives or employees for the sale of securities to the client.
>
> (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 non-performance, whether the contract grants discretionary power to the adviser or its representatives.

(Cal. Code Regs., tit. 10, § 260.238)

38. Pursuant to section 25238 and Cal. Code Regs., tit. 10, § 260.238, Respondents have a fiduciary duty to employ reasonable care to gather sufficient, updated information about clients'

financial standing and client needs and make investment recommendations that are suitable to clients' financial goals and needs. The 2018 Examination revealed that ICG failed to provide sufficient evidence demonstrating they had reasonable grounds to believe that their recommendations to investors were in fact suitable for several reasons:

a) the investor's investment objectives and/or financial situation were not adequately established or met;

b) ICG did not maintain or provide copies of the executed subscription agreements for some of the investors of The Fund;

c) The Agreement contains pertinent provisions as follows:

i. Section 6 of the LP Agreement includes a description of the fee and formula for computing the management fee. In addition, Section 5.1 includes a description of the performance allocation. However, the Agreement failed to disclose whether management fees and performance-based fees were charged in arrears or advance.

ii. Section 9.3 (a)(v) of the Agreement states that the general partner or any member of the general partner must register as an investment adviser under the Investment Advisers Act of 1940. However, the Commissioner finds the statement misleading as it may imply that ICG is a federally registered investment adviser.

iii. Bistritzky engaged in other business activities without disclosing them or any conflicts they may create in the Agreement.

Willfully Charging Fees Not Disclosed in Agreement

39. Section 25234 provides in pertinent part:

> (a) No investment adviser licensed under this chapter shall in this state enter into, extend or renew any investment advisory contract, or in any way perform any investment advisory contract entered into, extended or renewed on or after the effective date of this law, if that contract:
>
> (1) Provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client, except as may be permitted by rule or order of the commissioner….

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(Corp. Code, § 25234, subdivision (a) (1))

40. Cal. Code Regs., tit. 10, § 260.234 provides in pertinent part:

> The provisions of Section 25234 (a)(1) of the Code shall not apply:
> ….
> (b) to any investment adviser, provided all of the following are met:
> (1) the only clients entering into the investment advisory contract are "qualified clients" as defined in paragraph (d) of Rule 205-3 (17 CFR 275.205-3(d)) under the Investment Advisers Act of 1940 (Section 80b-1 et seq.), …
>
> (c) to an investment advisory contract with an institutional investor as defined in subdivision (i) of Section 25102 of the Code or in Section 260.102.10 or Section 260.105.14 of these Rules, excluding for the purposes of this section any pension or profit sharing plan with gross assets of less than $100,000,000 according to its most recent audited financial statement….

41. The 2018 Examination disclosed that Respondents charged performance-based fees to investors without disclosing in its Agreements that ICG's performance fee calculation does not use a high watermark, which is not standard industry practice. In addition, Respondents' Agreement does not comply with provisions of Cal. Code Regs., tit. 10, § 260.234 as it omits the following information:

a) State that ICG's performance fee calculation does not use a "high watermark."

b) Explain the concept and definition of a "high watermark."

c) Explain that it is industry practice to use a "high watermark" to calculate performance fees.

d) The potential for additional costs to the client when not using a "high watermark" to calculate the performance fees, specifically when client account suffers substantial losses in the prior period.

e) That lower fees for comparable services may be available elsewhere.

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Willfully Failing to Comply with Reporting Requirements

42. Cal. Code Regs., tit. 10, § 260.236.1 provides in pertinent part:

> (a) The procedures set forth in this subsection are applicable to investment advisers licensed pursuant to Section 25230 of the Code. References to an investment adviser representative shall mean both an investment adviser representative and an associated person of an investment adviser, as those terms are defined in Section 25009.5(a) of the Code.
>
> ….
>
> (3) Within thirty (30) days of any changes to the information contained in Form U4 an amendment to Form U4 shall be filed with CRD. If Form U4 is being amended due to a disciplinary occurrence, a copy of the amendment shall be filed with the Commissioner upon request.
>
> ….
>
> (b) The procedures set forth in this subsection are applicable to investment adviser representatives subject to the provisions of Section 25230.1(c) of the Code.
>
> ….
>
> (3) Within thirty (30) days after the termination of an individual as an investment adviser representative, Form U5 shall be filed with IARD in accordance with the form instructions. Form U5 shall clearly state the reason(s) for termination. If an investment adviser representative is terminated for cause, Form U5 shall, upon request, be filed directly with the Commissioner.

43. The 2018 Examination showed that Respondents failed to properly report events and activities in CRD. As noted in the 2018 Examination, ICG failed to renew its registration as an investment adviser as of December 31, 2018.

44. Further, Respondents failed to provide notice of changes to their ADV or correct several inaccuracies or omissions contained in Respondents' ADV, including but not limited to, omitting IGC's current address, names of its current officers and employees, hours of operation; contact information; the current number of clients and amount of asset-under-management; and all other business activities that ICG engaged in.

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Failure to Disclose Financial and Disciplinary Information

45. Section 25235 provides in pertinent part:

> It is unlawful for any investment adviser, directly or indirectly, in this state:
>
> (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.
>
> (c) Acting as principal for his own account, knowingly to sell any security to or purchase any security from a client for whom he is acting as investment adviser, or, acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of the transaction the capacity in which he is acting and obtaining the written consent of the client to such transaction.
>
> (d) To engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The commissioner shall, for the purpose of this subdivision, by rule define and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.
>
> (e) To represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless his principal business consists of acting as investment adviser and a substantial part of his business consists of rendering investment advisory services on the basis of the individual needs of his clients.

46. Cal. Code Regs., tit. 10, § 260.235.4. provides in pertinent part:

> (a) 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 to fail to disclose to any client or prospective client all material facts with respect to:
>
> > (1) A financial condition of the adviser that is reasonably likely to impair the ability of the adviser to meet contractual commitments to clients if (A) the adviser has discretionary authority (express or implied) or custody over such client's funds or securities, or (B) requires prepayment

> of advisory fees from such client 6 months or more in advance; or
>
> (3) A legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments or clients.

47. The 2018 Examination revealed that ICG did not prepare and maintain financial statements monthly as required under the CSL. As such, ICG was deemed to be deficient of its minimum financial requirement. Further, ICG did not disclose that its financial condition is likely to impair its ability to meet its contractual commitments to its clients, specifically the investors of The Fund.

48. Respondents represented to investors that ICG and The Fund were being sold to a secured lender but there is no documentation showing that Respondents timely notified investors or provided details of the purported sale to investors.

Unlawful Offers and Sales of Securities

49. Section 25110 provides in pertinent part:

> It is unlawful for any person to offer or sell in this state any security in an issuer transaction (other than in a transaction subject to Section 25120), whether or not by or through underwriters, unless such sale has been qualified under Section 25111, 25112, or 25113 (and no order under Section 25140 or subdivision (a) of Section 25143 is in effect with respect to such qualification) or unless such security or transaction is exempted or not subject to qualification under Chapter 1 (commencing with Section 25100) of this part. The offer or sale of such a security in a manner that varies or differs from, exceeds the scope of, or fails to conform with either a material term or material condition of qualification of the offering as set forth in the permit or qualification order, or a material representation as to the manner of offering which is set forth in the application for qualification, shall be an unqualified offer or sale.

50. CSL section 25110 prohibits the offer and sale of unqualified, non-exempt securities in any issuer transaction in this state.

51. The limited partnership interests in The Fund sold by Respondents are “securities” subject to qualification under the CSL.

52. Respondents "offered and sold" the securities referred to herein in the state of California within the meaning of CSL, sections 25008 and 25017.

53. Commencing at least February 2014, Respondents offered and sold securities in the form of investment contracts described as Limited Liability Partnership Agreement in The Fund in "issuer transactions" in the State of California, within the meaning of CSL sections 25008, 25010, 25011, and 25017 to at least two investors, raising at least $389,235.39.

54. The offer and sale of securities by the Respondents is not exempt from the requirement of qualification under CSL section 25110.

55. In California, companies offering or selling securities in reliance on Rule 506, Regulation D of the Securities and Exchange Commission (17 C.F.R. 230.501 et seq.), Securities Act of 1933, must file a Form D upon the first sale of securities in this state under section 25102.1(d). The Commissioner has no record of a Limited Offering Exemption Notice on file under section 25102(f) for The Fund.

56. Respondents offered and sold the securities in this state by means of written or oral communications that included untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in violation of section 25401 of the CSL, including:

(a) failing to provide investor statements to investors;

(b) representing to investors that they could liquidate their partnership interests and withdraw their investment after two years of investing, when in fact investors could not liquidate their interest or get their money back;

(c) neither preparing audited financial statements in the manner prescribed by law nor providing quarterly account statements to investors, which is deemed "to be a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 25235 of the Code for an investment adviser to have custody of client funds or securities…."

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IV.

Investor Complaints

Respondents Willfully Failed to Provide Quarterly Statements to Investors

57. Pursuant to section 25235 and Cal. Code Regs., tit. 10, § 260.237, Respondents are required to provide, at least quarterly, investor statements to investors. In their response to the April Letter, Respondents admitted that they have not been providing quarterly statements to investors and that the last time they provided quarterly statement to investors was in the 2nd Quarter of 2018.

58. On or about November 17, 2020, the Examiner interviewed investor C. S. who invested $100,000.00 in The Fund in about 2014. C.S. received quarterly investor statements from Respondents from about 2014 until the 2nd Quarter of 2018 when C.S. stopped getting investor statements. C.S. stated that in about May 2017, C.S. obtained a divestment of $25,000.00 from C.S.' account, leaving what C.S. believed to be a balance of $127,000.00 in C.S.' account. According to C.S., the last investor statement that C.S. received for the 2nd Quarter of 2018 reflected a balance of $119,563.45 in C.S.' account.

59. C.S. further told the Examiner that on May 5, 2017, C.S.' investment manager, S.B. informed C.S. that "ICG had not had proper audits and was being removed from the Fidelity Platform." During their conversation on May 5, 2012, C.S. learned from S.B. for the first time that The Fund was in "liquidation mode and expected to be liquidated by the end of the year." C.S. stated that C.S. did not know about Respondents' decision to liquidate their interests in The Fund and only heard about the liquidation through S.B.

60. In about May 2017, C.S. requested to liquidate C.S.' partnership interests in the Fund and withdraw C.S.' balance, however C.S. did not receive any response from Respondents. From about May 2017 to at least October 2020, C.S. sent numerous emails to Respondents repeatedly requesting to liquidate C.S.' limited partnership position and withdraw C.S.' capital investment. Despite Respondents' numerous assurances and promises to liquidate C.S.' partnership position and refund C.S.' capital investment, to date, C.S. has not received any funds back, including the balance of $119,647.95 reflected in the investor statement that C.S. received from Respondents.

61. On December 17, 2020, the Examiner interviewed investor W. R. who invested in The Fund in February 2014 with an initial principal investment of $180,000. Respondents represented through their offering circular and Agreement that W.R. could liquidate W. R's partnerships position and be reimbursed W. R's entire investment after two years of investing in The Fund.

62. W.R. received quarterly investor statements from Respondents from about 2015 until February 2018 when W.R. stopped receiving the statements. According to W.R., the last investor statement that W.R received from Respondents was for the 2nd Quarter of 2018 and it showed a balance of $269,671.94 in W.R.'s account in The Fund. W.R was not aware of any plans by Respondents to liquidate The Fund.

63. In September 2018, W.R. requested to liquidate W. R.'s partnership interest and withdraw W.R.'s balance of $269,671.94. W.R. further sent emails to Respondents requesting W.R.'s investor statement. On or about October 14, 2020, W.R received copies of W. R.'s Schedule K-1 tax form for the years 2018 and 2019 but never received statements or updates concerning the performance of W.R.'s investment. The 2019 Schedule K-1 tax form W.R. received from Respondents show a total loss of W. R.'s investment and to date, W.R. has not received W. R.'s capital from Respondents.

Respondents Willfully failed to Issue Audited Financial Statements for The Fund

64. A review of Respondents' ADV Part 1 filed on March 21, 2012, revealed that The Fund's financial statements are subject to an annual audit. In their response to the April Letter, on November 23, 2020, Respondents admitted that they have not filed audited financial statements for The Fund since 2014.

Respondents Willfully Failed to Provide Proper Disclosures to Investors

65. A review of Respondents' records disclosed a Confidential Private Offering Memorandum (POM) which provides in pertinent part:

> [T] he right of the Limited Partners to withdraw their investments in the Partnership is subject to certain requirements, including the lock-up provision. In general, withdrawals are permitted only monthly upon ninety (90) days' prior notice to the General Partner. These requirements limit the ability of a Limited Partner to liquidate an investment in the Partnership quickly. As a result, an

> investment in the Partnership would not be suitable for an investor requiring liquidity. Even if the General Partner determines that a withdrawal request can be honored, there may be a delay in obtaining the funds necessary to honor the withdrawal request due to the redemption policies of any securities in which the Partnership invests, or the inability of the General Partner to liquidate its investments in a manner or at a price it deems appropriate. Extraordinary circumstances may cause further delays in receiving withdrawal payments."

66. Both W.R. and S.C. reported that they did not receive copies of Respondents' POM. As such, Respondents failed to provide investors proper disclosures concerning the suitability of their investments, especially in light of the withdrawal provisions contained in the POM restricting investors from withdrawing their funds, in violation of section 25238 and Cal. Code Regs., tit. 10, § 260.238.

Respondents Willfully Failed to Honor Client Requests for Return of Funds

67. Respondents' Agreement provides in pertinent part:

> Withdrawals by the Partners.
>
> (a) Lock Up Period. Limited Partners may not withdraw their respective Interests, any amount of their respective Capital Accounts or otherwise withdraw from the Partnership during the twelve (12) month period immediately following their admission as a Partner to the Partnership (the "Lock-Up Period"), provided that the Lock-Up Period is not extended as a result of the automatic reinvestment of distributions, re-allocations, or by additional Capital Contributions by such Limited Partner. The General Partner, in its sole discretion, may waive the application of the Lock-Up Period for any Limited Partner. If the General Partner, in its sole discretion, permits a Limited Partner to withdraw any portion of its Interest or Capital Account during the applicable Lock-Up Period, the Partnership may charge an early withdrawal fee on the amount withdrawn, as determined by the General Partner in its sole discretion, which shall in no event exceed two percent (2%) of the amount withdrawn.
>
> (b) Withdrawal Procedure. Following the expiration or waiver of the applicable Lock-Up Period and subject to the restrictions on withdrawals and the right to suspend withdrawals as set forth herein, a Limited Partner may withdraw all or a portion of its

> Interest on the last business day of June and the last business day of December (and/or such other day(s) as the General Partner may determine in its sole discretion) (each a "Withdrawal Date"). Written notice of any withdrawal must be given to the General Partner at least ninety (90) days prior to the Withdrawal Date. A Withdrawal Request, once given, will be deemed to be irrevocable, except to the extent the General Partner permits the revocation thereof….

68. The Examiner's interviews with investors revealed that despite several requests by investors to liquidate their partnership positions and withdraw their investments, Respondents willfully failed to honor investors' requests as specified in the Agreement, in violation of section 25238 and Cal. Code Regs., tit. 10, § 260.238.

Respondents Willfully Failed to Pay Investment Adviser Renewal Fee

69. The Commissioner's records show that Respondents failed to file their investment adviser renewal fee that was due December 17, 2018. On January 2, 2019, the Commissioner issued a 10-Day Notice of Intention to Revoke the Investment Adviser Registration of ICG for failure to file their renewal fee. The Commissioner did not receive a response from Respondents. In addition, IARD's records show that as of March 2, 2021, ICG has, since December 31, 2018, failed to "renew due to insufficient funds in the renewal account."

V.

Authority to Revoke Respondents' Investment Adviser Certificates

70. Section 25232 provides in pertinent part:

> The commissioner may, after appropriate notice and opportunity for hearing, by order … revoke the certificate of, an investment adviser, if the commissioner finds that the … revocation is in the public interest and that the investment adviser, whether prior or subsequent to becoming such, or any partner, officer or director thereof or any person performing similar functions or any person directly or indirectly controlling the investment adviser, whether prior or subsequent to becoming such, or any employee of the investment adviser while so employed has done any of the following:
>
> (a) Has willfully made or caused to be made in any application for

> a certificate or any report filed with the commissioner under this division, or in any proceeding before the commissioner, any
>
> statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has willfully omitted to state in the application or report any material fact which is required to be stated therein.
>
> ….
>
> e) Has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940… or any order of the commissioner which is or has been necessary for the protection of any investor.
>
> (h) Has violated any provision of this division or the rules thereunder….

71. As alleged in paragraphs 20, 24 and 43, Respondents willfully failed to file Form ADV Annual Updating Amendments in violation of section 25241 and Cal. Code Regs., tit. 10, § 260.241.4. Further, Respondents failed to report pertinent events and activities in CRD. Respondents are required to maintain updated information with IARD with accurate answers to disclosure questions contained in Form ADV. By failing to file updated ADV since 2011 or report their activities and events concerning their investment advisory services, Respondents have willfully made in an application or report to the Commissioner, a statement which was at the time and in the light of the circumstances under which it was made false or misleading, or willfully omitted to state in the application or report any material fact which is required to be stated therein.

72. As alleged in paragraphs 50-58, Respondents unlawfully offered and sold securities by means of fraud by failing to provide investors statements and representing to investors that they could liquidate their partnership and withdraw their investments after two years of investing, when investors could not so liquidate their investments or withdraw their capital investments.

73. As alleged in paragraphs 26, 31, 34, 38-47, and 59 through 71 herein, Respondents violated several provisions of the CSL, thus warranting the revocation of Respondent's investment adviser certificates pursuant to section 25232, subdivision (h).

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VI.

Authority to Bar Bistritzky

74. Section 25232.1 provides in pertinent part:

> The commissioner may, after appropriate notice and opportunity for hearing… bar from any position of employment, management or control of any investment adviser, broker-dealer or commodity adviser, any officer, director, partner, employee of, or person performing similar functions for, an investment adviser, or any other person, if he or she finds that the censure, suspension or bar is in the public interest and that the person has committed any act or omission enumerated in subdivision (a) [and] (e) … of Section 25232… or is subject to any order specified in subdivision (d) of Section 25232.

(Corp. Code, § 25232.1)

75. As alleged in paragraphs 20, 24, 43, and 44, Respondents violated section 25232 (a) by willfully failing to file Form ADV Annual Updating Amendments in violation of section 25241 and Cal. Code Regs., tit. 10, § 260.241.4, and failing to report pertinent events and activities in CRD, including failing to maintain updated information with IARD with accurate answers to disclosure questions contained in Form ADV.

76. In addition, Respondents violated section 25232 (e) by willfully violating provisions the CSL and CCR.

77. Based on these acts and omissions Bistritzky should be barred from the investment industry.

VII.

Claim for Ancillary Relief

Restitution for Clients

78. Section 25254 provides, in part, that:

> (a) If the commissioner determines it is in the public interest, the commissioner may include in any administrative action brought under this part [Part 3 (commencing with CSL section 25200)] 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.

(Corp. Code, § 25254.)

79. The Commissioner brings the instant action pursuant to CSL, Part 3, sections 25232 and 25232.1, based on Respondents' acts, omissions, and violations.

80. Clients who invested in The Fund are entitled to restitution of the money they invested in the amount of at least $389,235.39, plus interest thereon, according to proof, based on these acts, omissions, and violations.

81. Respondents should pay restitution to clients who invested money in The Fund based on the above listed acts, omissions, and violations.

VIII.

Public Interest

82. Based on the foregoing, the Commissioner has deemed it in the public interest to revoke Respondents' investment adviser certificates and bar Bistritzky from the investment industry, and to include a claim for restitution to clients. Investment advisers are fiduciaries to their clients and must adhere to a strict fiduciary standard encompassing a duty of "utmost" good faith, full and fair disclosure of all material facts, and an obligation to use reasonable care to avoid misleading clients.

83. Investment advisers must act in the "best interest" of their advisory clients and fully disclose all conflicts of interest. As a fiduciary, an investment adviser must discuss clients' financial goals and educate clients on various ways to accomplish them; help clients assess how aggressive they can be with their investments and the amount of risk they can bear; analyze the client's goals and needs, research and analyze investments, strategies, and market conditions to determine which option is most appropriate and provide an investment strategy that can best help the client meet their goals.

84. Respondents violated this fiduciary duty to clients by committing acts, omissions, and violations of the CSL and CRR. For these reasons, it is therefore in the public interest to revoke the investment adviser certificates of Infinity Capital Group and Shlomo Mordechai Bistritzky and to bar Shlomo Mordechai Bistritzky from the investment industry and require that Respondents pay restitution to clients.

IX.

Relief Requested

WHEREFORE, based upon the foregoing, the Commissioner finds it is in the public interest to revoke the investment adviser certificates of Infinity Capital Group and Shlomo Mordechai Bistritzky pursuant to CSL section 25232, and to bar Shlomo Mordechai Bistritzky from the investment industry pursuant to section 25232.1, and to award restitution to clients.

WHEREFORE, IT IS PRAYED that the investment adviser certificate of Infinity Capital Group and Shlomo Mordechai Bistritzky be revoked pursuant to section 23232.

WHEREFORE, IT IS FURTHER PRAYED that Shlomo Mordechai Bistritzky be barred from any position of employment, management or control of any investment adviser, broker-dealer, or commodity adviser pursuant to section 25232.1.

WHEREFORE, IT IS FURTHER PRAYED that Infinity Capital Group and Shlomo Mordechai Bistritzky be ordered to pay restitution to clients who invested in The Fund, in the amount of at least $ 389,235.39, plus interest thereon, according to proof.

Dated: April 15, 2022

CLOTHILDE V. HEWLETT
Commissioner of Financial Protection and Innovation

By _____
UCHE L. ENENWALI
Senior Counsel
Enforcement Division