

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Order Revoking Investment
Adviser Certificate Issued by the California
Corporations Commissioner,

Complainant,

v.

Marina Capital Management, Inc.,

Respondent.

File No.: 121178

OAH No.: L2007070912

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated December 10, 2007, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter with the following technical and minor change pursuant to Government Code Section 11517(c)(2)(C).

On line 2 of Factual Findings, on page 2 of the Proposed Decision: "24230." should be "25230."

This Decision shall become effective on April 8, 2008.

IT IS SO ORDERED this 7th day of April 2008.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

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

In the Matter of:

THE CALIFORNIA CORPORATIONS
COMMISSIONER,

Complainant,

v.

MARINA CAPITAL MANAGEMENT,
INC.,

Respondent.

File No. 121178

OAH No. L2007070912

PROPOSED DECISION

The hearing in the above-captioned matter was held on December 10, 2007, at Los Angeles, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings, presided. Complainant was represented by Edward Kelly Shinnick, Corporations Counsel. Respondent failed to appear despite proper notice.

Evidence was received and the case was submitted for decision on the hearing date.

The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follows:

FACTUAL FINDINGS

1. Complainant Preston DuFauchard filed the Accusation in the above-captioned matter while acting in his official capacity as California Corporations Commissioner (Commissioner), of the Department of Corporations (Department), State of California.

2. Respondent Marina Capital Management, Inc. (Marina or Respondent) is a corporation doing business in Rolling Hills Estates, California. The Respondent is in the investment advisor business and holds an Investment Advisor Certificate (Certificate), which

Certificate was issued by the Commissioner on or about February 8, 1999. The Certificate was issued pursuant to Corporations Code section 24230.¹ Alvin Tatro is the president, chief financial officer, and sole shareholder of Marina.

3. Respondent was served with the Accusation in this matter, and it filed a Notice of Defense. Thereafter, Complainant served a timely Notice of Hearing, but Respondent failed to appear at the hearing.²

4. Because Respondent holds an investment advisor certificate issued by the Commissioner, jurisdiction exists for the Commissioner to bring this action against that certificate. All jurisdictional requirements have been met in this case.

5. On August 27, 2003, the Department began an examination of Respondent's business. The exam revealed that Respondent was in violation of provisions of the Corporate Securities Law, which provisions pertained to the maintenance of books and records of investment advisor businesses. The violations included the failure to maintain an accounting system in compliance with generally accepted accounting principles (GAAP) and the failure to provide the Department with annual financial reports for the years 2001 and 2002.³

6. The August 2003 examination also established that Respondent had power of attorney or discretionary power to execute transactions in the brokerage accounts of its investor clients, but it did not have custody of its clients' funds. Therefore, the Department deemed that Respondent was required to maintain a net worth of at least \$10,000; as set forth in the CCR at section 260.237.2.

7. In October 2003, the Department made a demand upon Respondent to comply with the aforementioned requirements of the Corporate Securities Laws, and to provide evidence of compliance. Some efforts were made by Respondent to comply, which occurred in fits and starts. Thus, for example, after making the demand for compliance, Department staff had to write Respondent one month later, because no reply had been received regarding the initial demand. (See Ex. 7-II.) Respondent did reply in December 2003, but the material

¹ All further statutory references shall be to the Corporations Code, unless otherwise stated.

² In July 2007, Respondent waived the 15-day time period required for a hearing, so that the matter could be set for hearing after October 9, 2007, a date more convenient for Respondent and Mr. Tatro. (Ex. 4.)

³ The failure to conform to GAAP was a violation of Code section 25241 and section 260.241.3 of title 10 of the California Code of Regulations (CCR). The failure to provide the Department with annual reports violated section 260.241.2 of title 10 of the CCR. Hereafter all citations to the CCR shall be to title 10 thereof.

submitted was deficient, as not complying with GAAP, and other requirements. Months passed with the Department making contact with Mr. Tatro, and receiving promises of compliance, but not receiving compliance.

8. In May 2005, the Department served Respondent with a Notice of Intention to Make Final an Order to Discontinue Violations of Corporations Code section 25241 and CCR sections 260.241.2 and 260.241.3. The Department also served a notice that it intended to issue an Order Levying Administrative Penalties of \$1,500 for Respondent's violations of the law. The orders made it clear that Respondent needed to use an accounting system that conformed with GAAP, and that it had to maintain a net worth in excess of \$10,000.

9. In September 2005, the Department was contacted by accountants acting on Respondent's behalf. They submitted annual financial reports for Marina for the period 2001 through 2004, which reports conformed to GAAP.

10. In November 2005, the Department received an interim report showing that Respondent had a net worth of only \$2,092, leaving it's net worth nearly \$8,000 below the legally-required minimum. In response, the Department gave Respondent additional time to remedy the deficiency, while warning it of possible administrative action against the Certificate.

11. Respondent subsequently provided reports for November and December 2005, and January 2006, showing that it met the minimum net worth figure. However, another regulation required that where an investment advisor's net worth falls below 120 per cent of the minimum—here \$12,000—it is required to file monthly reports, unless and until the investment advisor can show that it has met the 120 per cent requirement for three successive months.

12. Respondent submitted financial reports for the periods of February, March, and April 2006, and in each month it was deficient in its capital requirements. For March 2006 the deficiency reached \$8,999, or 90 per cent of the requirement.

13. In May, 2006, the Department again made demand upon Marina for compliance with the minimum capital requirement. As part of that demand, the Department required Respondent not to take any more investment clients until the matter had been remedied. Respondent was also required to notify its clients of the deficiency, and it was to provide a copy of such notices to the Department. While Respondent was able to make up the capital deficiency, it did not provide the Department with notices of the deficiency.

14. Respondent's monthly statements for May and June 2006 showed that it met the 120 per cent test, but the report for July 2006 showed that Marina only met the minimum requirement, and thus further monthly statements were required.

15. Respondent filed a monthly report for the period ending August 31, 2006, that showed that Respondent was deficient, in terms of capital, in the amount of \$391. This

resulted in yet another written demand from the Department to Respondent, dated September 22, 2006, which was similar to the demand the Department has issued to Respondent in May 2006. That is, the Department demanded that Respondent remediate the deficiency and provide an explanation for it and documentation of what it had done to remediate the capital shortfall. Respondent was to confirm, in writing, that it would not accept any additional clients until it had provided documentation showing it met the statutory minimum. Respondent was to confirm, again in writing, that it would maintain the minimum net worth and continue making monthly filings until it had met the 120 per cent requirement.

16. While Respondent continued to file monthly reports after the September 22, 2006 demand letter was issued, it did not otherwise provide the responses demanded in that letter. The monthly reports showed that Respondent did not meet the minimum net worth requirement for the balance of 2006. The deficiencies after August 2006 ran from a low amount of \$266 (September 2006) to a high of \$1,359 (December 2006).

17. At the end of January 2007, Respondent met the 120 per cent requirement, and it met the minimum \$10,000 requirement for February 2007. However, it was deficient \$11,893 in March 2007, and \$6,752 in April 2007. These deficits ballooned in subsequent months: Respondent was deficient in the amount of \$27,785 in May 2007, and \$30,842 in June 2007.

18. Department records establish that in the 21 months between October 2005 and June 2007, Respondent failed to meet the \$10,000 minimum net worth requirement in 13 of those months, i.e., for more than one-half of that time period.

19. The record establishes that Respondent has routinely been deficient in its obligation to maintain a minimum net worth of \$10,000, and in many months the deficits were substantial. The record also establishes that there has been a failure by Respondent to comply with Department demands, or to even communicate with the Department in response to its demands. Notes of phone conversations during the period January through April 2004 show a pattern of promises of compliance that went unperformed. (See Ex.'s 7-XIII, 7-IX, & 7-X.) Respondent can not or will not maintain a minimum net worth as required by laws governing parties holding investment advisor certificates from the Commissioner. The laws and regulations pertaining to investment advisors exist in order to protect the public. Respondent's failure to abide by the statutes and regulations, and its failure to communicate with and cooperate with the Department for a protracted period, establish that continued licensure would be against the public interest.

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LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to sections 25230, 25232, and 25233, based on Factual Findings 1 through 4.

2. Pursuant to section 25237, the Commissioner is authorized to prescribe rules and regulations governing the activities of investment advisors, including rules requiring minimum capitalization. Investment advisors are barred from violating such rules, pursuant to section 25238, and such violations are grounds for discipline under section 25232, subdivision (h).

3. (A) Respondent has violated CCR section 260.237.2 on 13 occasions between October 2005 and June 2007, based on Factual Findings 6 through 19.

(B) Respondent violated section 25241 and CCR section 260.241.3 by failing to maintain records in accordance with GAAP, based on Factual Findings 5, 7, and 8.

(C) Respondent violated section 25241 and CCR section 260.241.2 by failing to provide the Department with annual financial reports in 2001 and 2002, based on Factual Finding 5.

4. Respondent's financial advisor certificate is subject to revocation pursuant to section 25232 for its violations of section 25241 and applicable regulations, based on Legal Conclusions 1 through 3, and their factual predicates.

5. The purposes of proceeding of this type are to protect the public, and not to punish an errant licensee. (*E.g.*, *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164; see also §§ 25232, subd. (a) & 25232.1, subd. (a) [discipline of investment advisor certificate or of individual may be undertaken if in the public interest].) Here the Respondent has been unable or unwilling to maintain minimum capitalization; indeed, by the middle of 2007 the firm's net worth was at a deficit of \$30,000, the most during the nearly two years that Respondent filed monthly reports. The Respondent's past failures to timely file reports, or to respond to demands for communications with the Department and with Respondent's clients, are behaviors that should be considered as aggravating factors. Such is also further evidence that the public welfare is implicated by Respondent's conduct.⁴ The Department has attempted to work with Respondent so that it could bring its affairs into order, without success. In all the circumstances, the Respondent's investment advisor certificate must be revoked.

⁴ Respondent's failure to inform its clients of its financial condition, as demanded by the Department, was a violation of CCR section 260.235.4, and is a factor in aggravation when considering discipline.

ORDER

The investment advisor certificate issued to Marina Capital Management, Inc., is hereby revoked.

January 8, 2008

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings