FILED APRIL 17, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case Nos.: **09-O-12063-RAP** (09-O-17092);
	)	**09-O-12921-RAP**
	)	**(Consolidated.)**
JON A. DIVENS,	)	
Member No. 145549,	)	**DECISION AND ORDER OF INVOLUNTARY**
	)	**INACTIVE ENROLLMENT (Bus. & Prof. Code,**
	)	**§ 6007, subd. (c)(4).)**
A Member of the State Bar.	)	

Introduction[1]

In this contested, consolidated disciplinary proceeding, respondent **JON A. DIVENS** is charged with 3 counts of willfully violating section 6106[2] by engaging in acts involving moral turpitude in two separate securities matters. Respondent is represented by Attorney Zachary D. Wechsler. The Office of the Chief Trial Counsel of the State of Bar of California (State Bar) is represented by Senior Trial Counsel Eli Morgenstern.

Having considered the facts and the law, the court finds that respondent is culpable as charged on each of the three counts and that the appropriate level of discipline for the found misconduct is disbarment. Moreover, because the court will recommend that respondent be

[1] Unless otherwise indicated, all references to rules are to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code unless otherwise indicated.

[2] Section 6106 provides, in relevant part, that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes cause for suspension or disbarment.

disbarred, the court will also order that that respondent be involuntarily enrolled as an inactive member of the State Bar of California under section 6007, subdivision (c)(4).

Significant Procedural History

The State Bar filed the notice of disciplinary charges (NDC) in case number 09-O-12063-RAP, which is correlated with case number 09-O-17092, on October 19, 2010. Respondent filed a response to that NDC on November 29, 2010.

The State Bar filed the NDC in case number 09-O-12921-RAP on December 10, 2010. And respondent filed a response to the NDC in case number 09-O-12921-RAP on January 31, 2011.

The court issued an order of abatement and consolidation on January 13, 2011. Thereafter, on August 30, 2012, the court issued an order vacating the abatement and setting the matter for trial. The trial was on January 14, 15, 16, 17, and 18, 2013. At the close of the trial on January 18, 2013, the court took the matter under submission for decision.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on January 9, 1990, and has been a member of the State Bar of California since that time.

Credibility Determinations

The review department has made clear that "the hearing judge, as the trier of fact in State Bar proceedings, is to determine the credibility of witnesses and hearsay declarants. [Citation.]" (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588; *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 206.) With respect to the credibility of the witnesses in this State Bar proceeding, the court has carefully weighed and considered, inter alia, the witnesses' demeanor while testifying; the manner on which they testified; their personal interest or lack thereof in the outcome of this proceeding, and their

capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g., Evid. Code, § 780 [listing various factors to consider in determining credibility].)

After carefully weighing and considering the witnesses' testimony and after reflecting on the record as a whole, the court finds that much of respondent's and Frank Wilde's testimony lacks credibility, if not candor.[3] In fact, the court finds that almost all of respondent's and Frank Wilde's testimony on each disputed issue lacks credibility, if not candor. Furthermore, in numerous instances, respondent's and Frank Wilde's testimony in the State Bar Court was contrived, insincere, and implausible as well as inconsistent with reliable and credible documentary evidence.[4]

Related Civil Litigation

Many of the key factual issues in this State Bar Court disciplinary proceeding were previously adjudicated unfavorably to respondent in a federal district court interpleader action styled *Chase Investment Services Corp. v. Law Offices of Jon Divens & Assoc.*, LLC (C.D.Cal. 2010) 748 F.Supp.2d 1145, which was affirmed by the United States Court of Appeals for the Ninth Circuit in an unpublished opinion filed on August 6, 2012, in docket number 10-56785 (interpleader action). A two-day bench trial was held in the interpleader action in June 2010.

The federal district court's adverse civil findings in the interpleader action were made under the preponderance-of-the-evidence evidentiary standard and not the clear-and-convincing standard of proof applicable in State Bar Court disciplinary proceedings. Accordingly, the

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[3] Of course, the court's rejection of much of respondent's and Frank Wilde's testimony " 'does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.' " (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265; see also *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.)

[4] Of course, even in the absence of evidence contradicting it, a trial court is not bound to accept the sworn testimony of a witness as true. (See *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 498, fn. 7.)

federal court findings "are not binding in the State Bar Court and . . . the issues underlying [those] findings [must] be retried under the stricter clear and convincing evidence standard of proof." (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 322; *Magee v. State Bar* (1962) 58 Cal.22d 423, 429.)

At trial in this disciplinary proceeding, the State Bar proffered and this court admitted into evidence the federal district court's findings of fact and conclusions of law in the interpleader action. In addition, the testimony of the witnesses in the interpleader action was admitted into evidence in this disciplinary proceeding through the transcript of the trial in the interpleader action. (§ 6049.2.) The State Bar also proffered and this court also admitted into evidence almost all of the exhibits from the trial in the interpleader action. Those exhibits include direct-testimony declarations of two witnesses that were admitted into evidence in the interpleader action *without* objection.

Moreover, when making its credibility determinations in this disciplinary proceeding, the court did not discount the testimony of the witnesses that was presented through the trial transcript in the interpleader action or through the two witness declarations that were admitted into evidence in the interpleader action without objection from respondent. (*In the Matter of Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at p. 588.) In other words, the court considered and weighed transcript and declaration testimony just as if the witnesses had testified in person in the State Bar Court. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 206.)

At trial, respondent was afforded the opportunity "to controvert, temper, or explain the [federal court's adverse] findings with other evidence, including live testimony from the … same witnesses who testified in the [interpleader action]. [Citation.]" (*In the Matter of Applicant A,*

supra, 3 Cal. State Bar Ct. Rptr. at p. 325; *In the Matter of Kittrell, supra*, 4 Cal. State Bar Ct. Rptr. at p. 209.)

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Case Nos. 09-O-12063 and 09-O-17092 – The Betts and Gambles CMO

Facts

Before February 2009, Betts and Gambles Investments, Inc. and its affiliate Betts and Gambles Global Equities (collectively B&G) owned a collateralized mortgage obligation (CMO)[5] with a face value of $1,008,402,393 and that was issued by CW Capital from its Cobalt Series (Cobalt CMO). The actual value of the Cobalt CMO was much less than its face value.

The Cobalt CMO provided for monthly interest payment of $31,014.42 through its May 2046 maturity date. However, the amount of interest it actually paid varied monthly. From February 2009 through April 2010, the interest generated by the Cobalt CMO varied between about $23,500 to $30,500 per month and totaled $396,763.54.

In early January 2009, B&G entered into a contract to sell the Cobalt CMO to Up Right Holdings, LLC (URH) for $60,504,143.58. Jamie Williams, the principal of URH, suggested that respondent act as the escrow agent to hold the Cobalt CMO while URH arranged the

[5] A CMO is a special-purpose entity that owns an underlying pool of mortgages and issues securities to investors that provide defined rights to receive a portion of the payments of principal, interest, or both on the underlying pool of mortgages. A CMO is not a tangible security (i.e., it is not represented by a certificate). Rather, a CMO is represented as a book entry in a securities account held by a securities intermediary and is governed by the rules relating to the indirect holding system in revised article 8 of the California Uniform Commercial Code. (See Cal. U. Com. Code, § 8104, official comment 1; Cal. U. Com. Code, § 8501; official comment 4.) A securities intermediary is either a bank, broker, clearing corporation, or person who in the ordinary course of business maintains securities accounts for others. (Cal. U. Com. Code, § 8102, subd. (a)(14).)

When a securities intermediary indicates by book entry that a CMO has been credited to a person's securities account, that person becomes the "entitlement holder" of the CMO and, as such, becomes entitled to receive all of the economic and corporate rights of the CMO. (Cal. U. Com. Code, § 8102, subd. (a)(7).) And the securities intermediary becomes obligated to take action to obtain any payments or distributions made by the issuer of the CMO and to credit the payments or distributions to the entitlement holder's securities account.

financing it needed to purchase the CMO. Seth Beoku Betts, the president of B&G, agreed to use respondent as the escrow agent.

There were no written escrow instructions between B&G, URH, and respondent. Nor was there even a written escrow agreement.[6] Nonetheless, on February 3, 2009, B&G transferred the Cobalt CMO into respondent's law office's business services account at UBS (UBS account). Respondent controlled the UBS account. Neither URH nor respondent provided any consideration for the transfer.

According to Betts, respondent's only obligation was to hold the Cobalt CMO in escrow pending its sale to URH. According to respondent, he was initially approached only by Williams, who lied and told respondent that she was the owner of the Cobalt CMO and that she wanted to place the Cobalt CMO into a trading program. On February 14, 2009, respondent and URH, through Williams, entered into a joint venture agreement under which respondent was to invest the Cobalt CMO into a suitable trading program to generate profits, which were to be split evenly between respondent and URH. In that agreement, Williams represented that she and URH had the full legal power and authority to enter into the agreement and that no consent or authorization of a third party was required for the execution of the agreement.

Within a short period of time and no later than March 6, 2009, respondent learned that B&G was the true owner of the CMO and that Williams was a broker trying to buy the Cobalt CMO from B&G. On March 6, 2009, Attorney Derek Roberson, who represented B&G, faxed respondent a letter (1) notifying respondent that URH was unable to obtain the financing necessary to purchase the Cobalt CMO from B&G and (2) demanding that respondent immediately return the Cobalt CMO to B&G. In that letter, Attorney Roberson clearly stated that B&G had no obligation to enter the Cobalt CMO into a trading program and that B&G had

[6] In California, escrow instructions and agreements are not required to be in writing. (*Kelly v. Steinberg* (1957) 148 Cal.App.2d 211, 216.)

never consented to the investment of the Cobalt CMO in a trading program. On March 10, 2009, Attorney Roberson faxed a second letter to respondent again demanding the immediate return of the Cobalt CMO. Also, in early March 2009, Attorney Roberson called respondent and left several voicemail messages for respondent asking him to return the calls. Roberson also sent respondent several text messages stating that B&G was trying to reach him regarding the Cobalt CMO. Even though respondent received both of Roberson's letters, respondent never responded to them in any manner. Nor did respondent respond to any of Roberson's phone or text messages.

Respondent claims that, after he learned that B&G owned the Cobalt CMO, that Betts orally agreed to allow him to place the Cobalt CMO into a trading program. Not only does respondent's claim lack credibility, it is effectively rebutted by Attorney Roberson's March 2009 letters and messages to respondent and by respondent's failure to respond to those letters and messages in any manner. It is also clearly inconsistent with the fact that, in about early March 2009, Williams, Betts, respondent, and another individual exchanged draft joint venture agreements under which respondent was to place the Cobalt CMO into a trading program for B&G. However, Betts declined to execute any such contract.

On May 5, 2009, Attorney John Kelner, who also represented B&G, sent respondent a letter demanding the return of the Cobalt CMO. In that letter, Attorney Kelner also warned respondent that, if he did not return the Cobalt CMO to B&G within 30 days, then B&G would file a civil action against respondent for theft. Respondent failed to respond to Kelner's letter. Therefore, in July 2009, B&G filed a civil action against respondent and others for fraud and civil theft in a Florida state court. In that action, B&G sought damages of $60,504,143.58, which was the amount URH agreed to pay for the Cobalt CMO in January 2009.

On October 6, 2009, the Florida court entered a default judgment against respondent and in favor of B&G in the amount of $60,504,143.58. Based on that Florida judgment, the Los Angeles Superior Court issued a sister-state judgment against respondent and in favor of B&G in the amount of $60,915,595.23 ($60,504,143.58 for the amount of the Florida judgment plus $411,096.65 in accrued post-judgment interest).

Between March and September 2009, respondent transferred surreptitiously (i.e., without B&G's knowledge or authorization) the Cobalt CMO five times in an attempt to keep B&G from locating it. During that period of about seven months, respondent transferred the Cobalt CMO to a securities account[7] that respondent held and controlled in the name of the Law Offices of Jon Divens and Associates, LLC, a Nevada limited liability company, at each of the five following securities intermediaries: (1) Smith Barney; (2) Capstone; (3) Asset Enhancement Management; (4) Matrix; and (5) Chase Investment Services Corporation.

In addition, from February through October 2009, respondent surreptitiously transferred the monthly interest payments generated by the Cobalt CMO from the securities accounts in which respondent held the Cobalt CMO to his or his law office's business account at Bank of America. Respondent admits that he used those nine monthly interest payments, which totaled $241,980.43, for his own personal benefit.

The last securities account into which respondent deposited the Cobalt CMO was an account that respondent opened in late July 2009 at Chase Investment Services Corporation (Chase account). In about October 2009, Chase Investment Services Corporation (Chase) started receiving adverse claims against the three CMO's that respondent deposited into the Chase account. And, in mid-November 2009, Chase froze the Chase account. Then, in mid-December

[7] A security account is an account "to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person from whom the account is maintained as entitled to exercise the rights that comprise the financial asset." (Cal. U. Com. Code, § 8501, subd. (a).)

2009, Chase filed the interpleader action naming respondent, B&G, and others as defendants. Thereafter, B&G filed multiple cross-claims against respondent and his law office to recover the Cobalt CMO, the $241,980.43 in Cobalt CMO interest that respondent misappropriated, and the Cobalt CMO interest on deposit in the Chase account.

On April 14, 2010, the federal district court, in accordance with a stipulation between B&G, respondent, respondent's law office, and Chase in which respondent stipulated that B&G was the true owner of Cobalt CMO, filed an order directing that the Cobalt CMO be released from the frozen Chase account and transferred to B&G. Once the Cobalt CMO was transferred to B&G on April 26, 2010, B&G executed an acknowledgment of a $55 million partial satisfaction of B&G's sister-state judgment against respondent, which reduced the principal balance due on the sister-state judgment to $5,915,595.23 ($60,915,595.23 less $55,000,000).

After respondent stipulated that B&G was the rightful owner of the Cobalt CMO, the only issues remaining in the interpleader action with respect to respondent and B&G were whether respondent or B&G owned (1) the $241,980.43 in interest earned on the Cobalt CMO from February through October 2009 and (2) the $154,783.11 ($396,763.54 less $241,980.43) in interest earned on the Cobalt CMO from November 2009 through April 2010 and which that was deposited into the Chase account and not withdrawn by respondent.

The federal district court ultimately found that B&G owned the both the Cobalt CMO and all of the $396,763.54 in interest it earned from February 2009 through April 2010; that respondent did not provide any value in exchange for the transfer of the Cobalt CMO into the UBS account; and that respondent received the monthly interest payments on the Cobalt CMO for the benefit of B&G; that respondent withdrew the $241,980.43 in interest he held for the benefit of B&G and used it for his personal benefit; and that, because respondent refused to return the $241,980.43 in interest to B&G, respondent was liable, to B&G in the amount of

$241,980.43 on B&G's cross-claim for "money had and received"; and that B&G was entitled to 69 percent of the money then remaining in the frozen Chase account, which represented the same $154,783.11 in interest that was earned on the Cobalt CMO from November 2009 through April 2010.

Respondent appealed from the federal district court's judgment, but the Ninth Circuit affirmed the judgment against respondent on all counts. Even though the federal district court's adverse civil findings are not binding in this disciplinary proceeding, those findings constitute evidence in this proceeding. Moreover, after reviewing the portions of the evidentiary record in the interpleader action that were admitted into evidence in this disciplinary proceeding, this court finds that the federal district court's findings are supported by substantial evidence. Accordingly, those findings are entitled to a strong presumption of validity in this disciplinary proceeding. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. at p. 325, and cases there cited.)

Conclusions of Law

Count One (§ 6106 [Moral Turpitude])

In count one in case number 09-O-12063-RAP (09-O-17092), the State Bar charges that "By absconding with the Cobalt CMO … and misappropriating the interest generated from the Cobalt CMO for his own personal use, Respondent committed an act involving moral turpitude, dishonesty or corruption" in willful violation of section 6106. The record clearly establishes that respondent deliberately absconded with the Cobalt CMO and deliberately misappropriated for his own personal benefit (i.e., stole) the $241,980.43 in interest earned on the Cobalt CMO from February through October 2009. Indeed, such deliberate acts of misappropriation (i.e., theft) inherently involve not only moral turpitude, but also dishonesty in willful violation of section 6106.

The court rejects, for want of any credibility whatsoever, respondent's contentions that because he took the Cobalt CMO without notice of any adverse claims and provided value for the Cobalt CMO, he owned (i.e., was entitle to) the $396,763.54 in interest that the Cobalt CMO earned during the entire 15-month period from February 2009 through April 2010 throughout which respondent was the "entitlement holder" of the Cobalt CMO.[8] The court also rejects, for any want of credibility whatsoever, respondent's contention that, under California Uniform Commercial Code section 8502[9] (UCC section 8502), he was protected (or immune) from B&G's adverse claims to the Cobalt CMO and to the $396,763.54 in interest that the Cobalt CMO earned during the 15-month period from February 2009 through April 2010 because he was the entitlement holder during those 15 months and because he allegedly took the Cobalt CMO for value and without notice of any adverse claims. Furthermore, respondent's contentions are not only incredible, they are also implausible.

As the federal district court aptly held in the interpleader action, nothing in the California Uniform Commercial Code gave respondent any right in the Cobalt CMO itself or in the interest income it generated from February 2009 through April 2010 that was superior to that of B&G, who is the owner of the Cobalt CMO. (*Chase Investment Services Corp. v. Law Offices of Jon Divens & Assoc., LLC, supra,* 748 F.Supp.2d at p. 1168.) As the federal district court aptly held, respondent was not protected or immune, under UCC section 8502, from B&G's adverse and rightful claims to the Cobalt CMO and to the $396,763.54 in interest it earned from February

[8] Respondent was the "entitlement holder" of the Cobalt CMO during this 15-month period because throughout those 15 months, the Cobalt CMO was on deposit in securities accounts that respondent held and controlled in the name of his law office. (Cal. U. Com. Code, § 8102, subd. (a)(7).)

[9] Section 8502 provides that an action based on adverse claim to a [CMO], whether framed in conversion, replevin, constructive trust, equitable lien or any other theory may not be asserted against a person who acquires a security entitlement under Section 8510 for value and without notice of the adverse claim.

2009 through April 2010 because, inter alia, respondent did not give value for the securities entitlement he acquired after B&G deposited the Cobalt CMO into the UBS account. One who obtains legal title (but not equitable title or beneficial interest) and possession of a CMO from or through a co-venturer in furtherance of the operation of the joint venture, like respondent did in the present proceeding, has not given value for the security entitlement and is not given the protection afforded in UCC section 8302 with respect to the claims on of a co-venturer. To conclude otherwise would effectively alter law of joint ventures.

In addition, respondent was not protected or immune from Williams or B&G's adverse claims under UCC section 8502 because, when respondent obtained possession of the Cobalt CMO, he took it both in furtherance of his February 14, 2009, joint venture agreement with URH[10] and subject to a resulting trust in favor of URH, as if URH were actually the true owner of the Cobalt CMO.[11] Accordingly, respondent's relationship with URH was not governed by the California Uniform Commercial Code (including UCC section 8502), but by California law on joint ventures and on resulting trusts. (See Cal. U. Com. Code, § 8102, official comment 7 ["Unless the entitlement holder is itself acting as a securities intermediary for the other person, … the relationship between an entitlement holder and another person for whose benefit the entitlement holder holds a securities entitlement is governed by other law," and not the Uniform Commercial Code.].)

Moreover, when Williams (and URH) fraudulently induced B&G to transfer the Cobalt CMO to the UBS account by telling Betts that respondent was going to hold the Cobalt CMO as

[10] Co-venturers are fiduciaries of one another and, as such, owe each other all of the duties of a fiduciary, including the duty of utmost good faith and fair dealing.

[11] A resulting trust is imposed by law when someone transfers property under circumstances suggesting that the person did not intend for the transferee to have or own the beneficial interest or equitable title to the property. A resulting trustee (i.e., the transferee) is an actual fiduciary of the transferor.

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an escrow agent, a constructive trust in favor of B&G arose.[12] Thus, when respondent obtained possession of the Cobalt CMO as a result of Williams' (and URH's) fraudulent conduct, respondent took the Cobalt CMO subject to the constructive trust in favor of B&G. Accordingly, just like his relationship with URH, respondent's relationship with B&G was not governed by the California Uniform Commercial Code (including UCC section 8502), but by California law on constructive trusts. And, under California law on joint ventures, resulting trusts, and constructive trusts, B&G was entitled to recover the Cobalt CMO and the $396,763.54 in interest it earned from February 2009 through April 2010 from respondent.

Once respondent learned of Williams's fraudulent actions and conduct, he had a duty to promptly transfer the Cobalt CMO and the interest paid on to B&G.

Moreover, respondent's expert witness in this disciplinary proceeding testified that one purpose of article 8 of the California Uniform Commercial Code is the protection of entitlement holders who obtain securities for value, presumably in furtherance of the Uniform Commercial Code's goal of fostering commerce through the fast and orderly sale and transfer of securities. However, in this case, respondent was not utilizing the protections afforded in article 8 as an innocent or good faith entitlement holders, but was using the afforded protections to veil his misconduct. In short, respondent may not rely on UCC section 8502 to justify his misconduct.

Respondent's reiteration, in this disciplinary proceeding, of his meritless and frivolous contentions (1) that he was entitled to not just the $241,980.23 in interest that he misappropriated, but to the entire $396,763.54 in interest that the Cobalt CMO generated during the 15-month period from February 2009 through April 2010 and (2) that he was protected and immune, under UCC section 8502, from B&G's adverse claims to the Cobalt CMO and to the

[12] A constructive trust is not created by the parties, but is imposed by the law to prevent unjust enrichment.

$396,763.54 in interest it earned is a serious aggravating circumstance, particularly after the federal district court rejected the meritless and frivolous contentions in its published decision in the interpleader actions, because respondent's contentions were not based on an honestly held, but erroneous construction of the law. (See discussion under Aggravating Circumstances, *post*.)

Case No. 09-O-12921 – The FNMA CMO

In December 2008, Amedraa, LLC owned a CMO issued by the Federal National Mortgage Association with a face value of $305,000,000 (FNMA CMO).

In December 2008, Amedraa and LNJ Enterprises, LLC (LNJ) entered into a joint venture agreement in which Amedraa authorized LNJ and James Savor, LNJ's vice-president, to act as Amedraa's agents for purposes of placing the FNMA CMO with a broker for investment purposes. Before Amedraa and LNJ entered into that joint venture agreement, Savor had been forewarned not to do business with a man named Frank Wilde or a company called Matrix Holdings.

In December 2008, Savor entered into negotiations with Steve Woods of Wise Guys Investments, LLC (WG Investments) in an attempt to enter the FMNA CMO into an investment program. Then, on December 8, 2008, LNJ entered into a written financial consulting and asset management agreement with WG Investments. Woods signed the consulting and management agreement on behalf of WG Investments, and Linda Starr, the president of LNJ, signed the agreement on behalf of LNJ.

Under the consulting and management agreement, LNJ was required to deliver, to WG Investments, the FMNA CMO and two other CMO's controlled by LNJ. WG Investments would then identify and manage the entry of the CMO's into one or more investment opportunities. LNJ and WG Investments would then split any profits generated by the investment programs according to a percentage schedule detailed in the agreement.

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In addition, under the consulting and management agreement, WG Investments was required to make an advance payment of one percent of the face value of the three CMO's to LNJ within 5 business days after LNJ delivered the three CMO's to WG Investments.

Later, Savor noticed the name Matrix Holding/WG Investments in the agreement. Savor questioned Woods at length about whether Frank Wilde had any involvement with the consulting and management agreement and told Woods he wanted nothing to do with Wilde. Woods told Savor that Wilde was not involved.

Woods suggested to Savor that LNJ transfer the FMNA CMO to the escrow account of respondent's law office, pending WG Investments' payment of the one percent advance payment. Savor was not familiar with respondent.

On December 31, 2009, LNJ, WG Investments, and respondent entered into an agreement under which respondent was to serve as the escrow agent for LNJ and WG Investments. The escrow agreement requires: (1) that LNJ deposit the three CMO's into respondent's escrow account; (2) that WG Investments deposit the advance payment of one percent of the face value of the three CMO's into respondent's escrow account within one business day after LNJ deposits the three CMO's into respondent's escrow account; and (3) that respondent then wire the one percent advance payment to LNJ and release the CMO's to WG Investments.

Paragraph 4 of the escrow agreement states:

> [T]he Escrow Agent's only responsibility and obligation to [LNJ] and [WG Investments] shall be to hold the CMO's and disburse the Advance Payment …. In the event that the CMO's are delivered to the escrow account and the Advance Payment is not deposited by [WG Investments], it shall be the Escrow Agent's duty to return the CMO's via DTC transfer to the coordinates given by [LNJ].

The escrow agreement also provides that no oral instruction shall be honored and that WG Investments is solely responsible for all of the fees associated with the escrow, the distribution of the advance payment, and the delivery of the CMO's to WG Investments.

Under the escrow agreement, respondent's involvement in the LNJ/WG Investments consulting and management agreement was clearly limited to that of an escrow agent. As such, respondent was a fiduciary to both LNJ and WG Investments and owed each of them all of the duties of a fiduciary, including the duty of utmost good faith and fair dealing.

On January 5, 2009, LNJ received confirmation that the FMNA CMO had been deposited into respondent's securities account at Morgan Stanley (Morgan Stanley account). Savor began making demands on Woods to deposit the one percent advance payment into respondent's escrow account. However, Woods never delivered the payment.

On January 14, 2009, Savor learned that the Morgan Stanley account had been suspended.[13] Savor immediately contacted respondent, and respondent told him that the CMO's had been transferred to respondent's securities account at UBS Financial Services (UBS account).[14] Savor then asked respondent to return of the CMO's. And respondent told Savor to talk to Woods about the return of the CMO's.

Next, Savor contacted Woods, and Woods told Savor that WG Investments was unable to place the three CMO's in a trading program and could not fulfill its obligations under the LNJ/WG Investments consulting and management agreement. Woods also told Savor to speak with respondent about the return of the CMO's.

[13] Respondent did not tell Savor that the Morgan Stanley account had been suspended.

[14] The Morgan Stanley account was closed at the request of Morgan Stanley.

Later in January 2009, Savor spoke with respondent on the telephone and demanded that respondent return the three CMO's to LNJ, which according to Savor, respondent agreed to do. Respondent, however, failed to return the CMO's to LNJ.

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Moreover, sometime in late January 2009, Savor received a telephone call from respondent and Frank Wilde.[15] Wilde identified himself as respondent's partner. Savor told respondent and Wilde that he wanted the CMO's returned. To an astonished Savor, Wilde stated that the CMO's had already been placed into a trading program. Savor told Wilde and respondent that he did not have an agreement with Wilde (or respondent) to trade the CMO's and that, by placing the CMO's in trade, Wilde and respondent were stealing. Wilder told Savor that there was really nothing that he could do because the CMO's were already in trade and it would cost a lot of money to get them back.

In early February 2009, Savor learned that Wilde might not have already placed the CMO's in trade and that Wilde was then trying to do so. When Savor called respondent and Wilde, he was told again that the CMO's had been placed into a private placement trading program. Savor told respondent and Wilde that respondent was to act only as an escrow agent and that any attempt to encumber the CMO's would constitute theft of LNJ's property. Savor again demanded the return of the CMO's.

On February 3, 2009, Savor sent an email to Divens, Wilde, and Woods, demanding that respondent turn over, to LNJ, all of the monthly interest payments that had been made on the three CMO's while they were in respondent's possession and instructing that the three CMO's were to remain unencumbered and were not to be used for any purpose.

[15] This Frank Wilde is the same Frank Wilde of Matrix Holdings who Savor had been warned to avoid.

On February 4, 2009, Woods responded to Savor via an email stating that the three CMO's remained in respondent's account unencumbered and suggesting that Savor contact respondent and Wilde concerning their offer to put the CMO's in trade. In his reply email to Savor, Woods also wrote that "cmos pay interest to the owner, which is you."

Also, on February 4, 2009, Woods sent Savor an unsolicited purchase agreement on respondent's letterhead, which respondent already had executed. That agreement named respondent as the escrow agent for LNJ's CMO's and provided that LNJ was selling the CMO's to PM Management Services. Savor had never heard of PM Management Services; nor had Savor ever authorized the sale of the three CMO's. Savor did not sign the agreement.

By mid-February 2009, Woods and WG Investments had still not placed the CMO's in an investment or trading program, and WG Investments still had not made the required advance payment. Thus, on February 16, 2009, Attorney Bethel Harris, who represented LNJ, sent respondent and Woods an email again requesting that the CMO's be returned to LNJ in accordance with the written escrow agreement because WG Investments was unable to place the CMO's in a private placement platform. That same day, Savor sent respondent and Wilde an email again stating that they had no authority to trade or encumber the CMO's.

Respondent did not return the CMO's to LNJ. Instead, on February 17, 2009, respondent sent Savor an email stating that, per the instructions of the contracted parties, the CMO package was sent out to a trading program and that Savor should contact Wilde for further details.[16]

On February 18, 2009, Wilde emailed Savor informing him that Wilde and respondent had placed the CMO's in a trading program. Wilde further stated that, since Savor did not

[16] Respondent testified that, sometime in January 2009, he reached an oral agreement with Savor that allowed him to enter the FMNA CMO into a trading platform. Respondent's self-serving testimony is not credible. Furthermore, respondent did not produce any documentation to support his claim. And, in any event, the documentary evidence refutes respondent's claim.

communicate with him after Savor rejected the proposed sale of the CMO's to PM Management, Wilde was under the impression that Savor consented to placing the CMO's into trade. Further, in an attempt to ratify what Wilde claimed had already been done, Wilde sent Savor a draft agreement authorizing respondent and Wilde to place the CMO's into a trading program.

On February 18, 2009, Savor attempted to contact respondent and Wilde by phone. Neither one would take Savor's call.

On February 18, 2009, Attorney Harris sent respondent an email noting that LNJ never contracted with Wilde to have the CMO's placed into a trading program, that LNJ never gave permission to respondent to move the CMO's from his escrow account, and that Woods concurred that the CMO's should be returned to LNJ. Attorney Harris threatened to report respondent to the California Bar, the FBI, and the SEC. Respondent did not respond to Harris's email.

On February 21, 2009, Savor sent respondent and Wilde an email accusing them of stealing and violating numerous laws. Savor also made clear that he had never agreed to allow respondent or Wilde to trade the CMO's and that the only contract that LNJ ever made regarding the investment of the FNMA CMO was its December 8, 2008, consulting and management agreement with WG Investments, which Woods aptly confirmed was then void.

On February 23, 2009, Evelyn Aardema, principal of Amedraa LLC, sent respondent and Wilde an email in the style of a formal cease and desist letter (1) informing respondent and Wilde that she was the owner of the FNMA CMO; that neither respondent nor Wilde was authorized to trade the FNMA CMO; and that the December 8, 2008, consulting and management agreement was void as a result of WG Investments' inability to place the CMO's in trade program and (2) ordering respondent and Wilde to immediately return the FNMA CMO to LNJ.

According to Savor, on February 26, 2009, Savor left phone messages for respondent and Wilde informing them that Savor had contacted the Beverly Hills Police Department about their

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theft of the CMO's. Wilde responded by sending Savor an email stating that respondent would not release the CMO's to LNJ unless LNJ agreed to a trade deal with Wilde and respondent.[17]

Next, Savor had another phone conference with respondent, Wilde, and Attorney Harris regarding the terms of the trade program into which respondent and Wilde purportedly placed the FNMA CMO. However, neither respondent nor Wilde would reveal any information about where the CMO's were.

On February 27, 2009, Savor sent respondent and Wilde an email informing them that Wilde's proposed trade deal was unacceptable and again demanding that respondent immediately return the three CMO's, including the FNMA CMO, to LNJ. Savor provided wiring coordinates to where the CMO's were to be returned. Respondent still failed to return the CMO's to LNJ.

A week later, on March 4, 2009, Savor spoke with Wilde by telephone. Wilde informed Savor that the CMO's had already been entered into a trading program and refused to return the FNMA CMO to LNJ. Wilde proposed that LNJ enter into a contract with respondent and Wilde to split the profits from placing the CMO's in a trading program. In that regard, Wilde noted that, within the next week or two, he receive income from the trading program.

Savor discussed Wilde's proposal with Aardema and her husband. Savor was against entering into the trade agreement with respondent and Wilde. The Aardemas, however, felt they had no choice but to enter into the agreement with respondent and Wilde. By entering into a written binding contract with respondent and Wilde, the Aardemas felt that they might be able to

[17] There is no documentary evidence in either the interpleader action or this State Bar Court disciplinary proceeding regarding the February 26, 2009, email from Wilde to Savor.

exercise some control over the FNMA CMO. The Aardemas also believed that, if respondent and Wilde did not perform on the trade agreement, it would be easier for them to recover the FNMA CMO. Accordingly, the Aardemas authorized LNJ to enter into an agreement authorizing respondent and Wilde to place the FNMA CMO in a trading program.

Thereafter, on March 12, 2009, LNJ entered into such an agreement with respondent's law office and Matrix Holdings, LLC. Wilde is the managing director of Matrix Holdings. That March 12, 2009, trading agreement[18] recites that the FNMA CMO and one of LNJ's other two CMO's, which were previously delivered to respondent's law office/Matrix Holdings, had already been entered into an investment program in February 2009. The agreement further provides that 50 percent of the profits from the investment program, if any, be paid to LNJ and that the remaining 50 percent of the profits be paid to respondent's law office and Matrix Holdings; that the term of agreement was from March 10, 2009, to March 31, 2010; that, even though the CMO's were previously delivered to respondent's law office/Matrix holdings, "[LNJ] shall remain the sole legal and beneficial owner of the [CMO's] at all times during the term of this Agreement."

The March 12, 2009, trading agreement further provides that, at the end of its term, respondent's law office and Matrix Holdings were to return the CMO's to LNJ free and clear and unencumbered.

The March 12, 2009, trading agreement further provides that "approximately $1,000,000 (USD) shall be paid to [LNJ] within two (2) weeks from the execution of this agreement, or such additional amount as actually be earned and paid to [respondent's law office /Matrix Holdings]." The agreement also provides that, if respondent's law office/Matrix Holdings failed to make the

[18] In the interpleader actions, the federal district court found that LNJ did not enter into the March 12, 2009, trading agreement under economic duress because the evidence did not establish that LNJ had no reasonable alternative but to succumb to respondent and Wilde's wrongful coercion and enter into the agreement.

$1 million payment or any other payment due under the contract and did not cure such failure within 7 business days, then LNJ may recall the CMO's.

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By late March 2009, respondent's law office/Matrix Holdings had not made any payments under the March 2009 agreement. Nor had respondent given LNJ any of the monthly interest payments respondent received on the FNMA CMO since January 2009.

On March 25, 2009, Savor sent respondent an email stating that, because respondent had not given LNJ any of the some $30,000 in interest that its CMO's had generated since they had been in respondent's possession, Savor assumed that respondent had no intention of giving LNJ the interest and that respondent intended to keep the interest for himself. The next day, respondent responded stating that "we have every intention of paying you every dime earned on your CMO" and that he hoped to have all the interest payments to LNJ within a matter of days. Respondent, however, never paid any of the interest he collected on the CMO's to LNJ.

On March 31, 2009, Attorney Harris wrote to respondent and Wilde informing them that they were in breach of the March 12, 2009, trading agreement because they failed to make the required $1,000,000 payment by March 27, 2009. Despite promising to do so, respondent never paid LNJ the amount due under the March 12, 2009, trading agreement.

On April 14, 2009, Starr sent respondent and Wilde a formal notice of default on the March 12, 2009, trading agreement in which she recited that respondent's law office and Matrix Holdings had failed to make the $1,000,000 payment required by March 27, 2009, under paragraph 12 of the agreement or to make various other payments required by the agreement. Starr also demanded that respondent's law office and Matrix Holdings return the CMO's to LNJ within 5 business days.

Neither respondent nor Wilde responded to Starr's notice of default. Nor did respondent or Wilde ever make any of the required payments to LNJ. Moreover, even though the FNMA CMO was never actually placed in a trading program, respondent did not return the FNMA CMO to LNJ. In fact, after respondent transferred the FNMA CMO to the UBS account when Morgan Stanley suspended his account in January 2009, respondent surreptitiously transferred LNJ's three CMO's (including the FNMA CMO) to accounts that respondent held and controlled in the name of his law office at five different financial institutions (i.e., JP Morgan, Smith Barney, Capstone, Matrix, and Chase). It is clear that respondent repeatedly transferred the three CMO's with the intent of thwarting LNJ's attempts to locate them.

In addition, from January through October 2009, respondent surreptitiously transferred the monthly interest payments on the FNMA CMO from the securities accounts in which he held the FNMA CMO to his or his law office's business account at Bank of America. Respondent admits that he used those 10 monthly interest payments, which totaled $157,444.40, for his own personal benefit.

The last account in which respondent deposited the FNMA CMO was the Chase account. In fact, the FNMA CMO was on deposit in the Chase account when Chase froze the account in October 2009. Thus, because Amedraa was a claimant with respect to the FNMA CMO, Chase named Amedraa as a defendant in the interpleader action. Thereafter, Amedraa filed multiple cross-claims seeking to recover the FNMA CMO, the $157,444.40 in FNMA CMO interest that respondent misappropriated, and the FNMA CMO interest on deposit in the Chase account.

On February 23, 2010, the federal district court, in accordance with a stipulation between Amedraa, respondent, respondent's law office, and Chase in which respondent stipulated that Amedraa was the true owner of FNMA CMO, filed an order directing that the FNMA CMO be released from the frozen Chase account and transferred to Amedraa. After respondent stipulated

that Amedraa was the rightful owner of the FNMA CMO, the only remaining issues for the trial in the interpleader action with respect to respondent and Amedraa was whether respondent or Amedraa owned (1) the $157,444.40 in interest that was earned on the FNMA CMO from January through October 2009 and (2) the $56,161.30 ($213,605.70 less $157,444.40) in interest that was earned on the FNMA CMO from November 2009 through February 2010 and on deposit in the frozen Chase account..

After the trial in the interpleader actions, the federal district court found that Amedraa was the rightful owner of both the FNMA CMO and all of the $213,605.70 in interest it generated from January 2009 through February 2010; that respondent did not provide any value in exchange for the transfer of the FNMA CMO into Morgan Stanley account; that respondent obtained possession of the FNMA CMO as an escrow agent under the terms of the December 2009 escrow agreement; that respondent received and held the monthly interest payments on the FNMA CMO as a fiduciary of LNJ (and Amedraa); that respondent withdrew the $157,444.40 in interest he held in trust for LNJ (and Amedraa) and converted and misappropriated it for his personal benefit in breach of his fiduciary duties to LNJ (and Amedraa); that, because respondent failed to return the $157,444.40 in interest to LNJ or Amedraa, respondent was liable, to Amedraa in the amount of $157,444.40 on Amedraa's cross-claim for conversion; and that Amedraa was entitled to 13 percent of the money then remaining in the frozen Chase account, which represented the $56,161.30 in interest that was earned on the FNMA CMO from November 2009 through February 2010.

The federal district court's findings are not only supported by substantial evidence, but they are also supported by clear and convincing evidence. Moreover, the record in the present disciplinary proceeding establishes the each of the same findings by clear and convincing evidence.

The court rejects respondent's claims for quantum meruit in both the FMNA CMO matter and the Cobalt CMO matter because the claims lack credibility. In addition, just like the federal district court, this court also finds that all of respondent's quantum meruit claims are meritless.

Moreover, the court finds that respondent's claim for quantum meruit lacks credibility and is meritless.

Count One (§ 6106 [Moral Turpitude])

In count one in case number 09-O-12921-RAP, the State Bar charges that respondent willfully violated section 6106 "By not returning the [FNMA CMO] to LNJ when [WG Investments] failed to make the advanced payment and at the request of LNJ in breach of his fiduciary duty under the Escrow Agreement and in order to obtain some personal profit from the [FNMA CMO]."

Multiple Supreme Court opinions make clear that, in the capacity of escrow agent, holder or trustee, an attorney owes both the buyer and the seller the same fiduciary duties that an attorney owes to his or her clients. (E.g., *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355, *Simmons v. State Bar* (1969) 70 Cal.2d 361, 365, *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156.) Thus, when WG Investments failed to make the required advance payment of one percent of the face value of the three CMO's, *honesty* required respondent to return the FNMA CMO to LNJ (or Amedraa), which was the party entitled to it. (*Crooks v. State Bar, supra*, 3 Cal.3d at p. 358.) Not only did respondent fail to return the FNMA CMO to LNJ (or Amedraa) on his own accord as *honesty* required, but he failed to do in response to the repeated demands that he do so by the agents of rightful owner and by the rightful owner, herself. Without question, respondent deliberately and intentionally breached his fiduciary duties as a escrow agent when failed to return the FNMA CMO. Thus, respondent's failure to return the FNMA CMO in deliberate and

intentional breach of his fiduciary duties involved not only moral turpitude (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208 ["an attorney's deliberate breach of a fiduciary duty … involves moral turpitude even in the absence of an attorney-client relationship"]), but also dishonesty because it rose to the level of theft. The fact that LNJ thereafter entered into the March 12, 2009, trading agreement with respondent does not vitiate or ameliorate respondent's deliberate and intentional breach of his fiduciary duties or mitigate his intentional theft of the FNMA CMO in the first instance.

Count Two (§ 6106 [Moral Turpitude])

In count two in case number 09-O-12921-RAP, the State Bar charges that respondent willfully violated section 6106 "By misappropriating approximately $157,444 of the interest payments earned on the [FNMA CMO] belonging to LNJ and Amedraa."

At trial in this disciplinary proceeding, respondent testified that although he disagrees with the federal court decision in the underlying matter, he intends to pay the outstanding judgments in favor of B&G and Amedraa. Respondent blames the federal court's findings against him on "bad lawyering" at the interpleader trial and insists that he is entitled to the interest income generated by the Cobalt CMO and FNMA CMO because he was an entitlement holder under article 8 of the California Uniform Commercial Code.

In an attempt to support his meritless claims, respondent presented expert testimony from Russell A. Hakes, who has been a Professor of Law at the Widener University School of Law in Wilmington, DE, since 1988. Prior to teaching, Hakes was in private practice in Los Angeles, involved in all areas of commercial law; corporate finance; real estate finance; and general real estate. Hakes has published numerous books and articles; MCLE material; and appeared at numerous presentations concerning the Uniform Commercial Code. Among other professional

service affiliations, since 2001 Hakes has been the co-editor of the Annual Uniform Commercial Code Survey for the American Bar Association.

Hakes believes that, pursuant to the California Uniform Commercial Code, respondent is entitled to the status of entitlement holder of both the Cobalt CMO and the FNMA CMO and to the protections afforded by UCC section 8502 so that he was immune from the LNJ's and Amedraa's claims of ownership of the FNMA CMO and of the interest income it generated as well as B&G's claims of ownership of the Cobalt CMO and the interest income it generated. According to Hakes, both the Cobalt CMO and the FNMA CMO matters are, at best, civil/business disputes, not matters of professional responsibility. The court rejects almost all of Hakes expert testimony because it is lacking in both credibility and plausibility and because it is based on facts not established by the record. Hakes's testimony regarding the ultimate issues in this proceeding was primarily based on oral contracts and agreements that respondent contends he had with B&G, LNJ, Amedraa, and others. As noted *ante*, this court rejects respondent's contentions (i.e., testimony) regarding the oral contracts and agreements he allegedly had or made with B&G, LNJ, Amedraa, and others for lack of both credibility and plausibility.

The record clearly establishes that respondent's misconduct involved a pattern of deception and greed that continued all through his dealings with Savor, LNJ, and Amedraa. First, respondent refused to return the FNMA CMO upon numerous requests by the parties entitled to it in breach of the clear fiduciary duties that respondent owed to LNJ and Amedraa as an escrow agent, which lead Amedraa to agree to the March 12, 2009, trading agreement. Second, respondent breached the March 12, 2009, agreement and continued ignoring Amedraa's just and proper demands for the return of the FNMA CMO. Respondent also surreptitiously moved the FNMA CMO from one securities account to another, withdrew and misappropriated

for his own use and benefit the $157,444.40 in interest income generated on the FNMA CMO, an assert that respondent held in trust.

At trial in this disciplinary proceeding, respondent admitted that he used his personal judgment to determine what LNJ wanted. According to respondent, LNJ did not really care about the interest generated by the FNMA CMO; instead, what LNJ wanted was for its three CMO's (including the FNMA CMO) to be placed in a trading program. This self-serving testimony further establishes that respondent fails to appreciate the wrongfulness of his misconduct.

It is clear from the evidence that, from day one, respondent never intended on returning the Cobalt CMO or the FNMA CMO or the interest income they generated to the rightful owners. The record establishes a common plan in both the Cobalt CMO and the FNMA CMO matters. In both matters, respondent's plan was to take possession of the CMO's and permanently misappropriate them by surreptitiously moving them among various securities accounts; to ignore the numerous and repeated demands of the rightful owners for the return of the CMO's and the interest income as if the demands had never been made; and to misappropriate the interest generated by the CMO or CMO's for his own use and benefit. In sum, the record in this disciplinary proceeding clearly establishes the misconduct charged in count two.

Aggravation[19]

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent's misconduct involves multiple acts of misconduct, which is an aggravating circumstance.

[19] All references to standards (or Stds.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent's misconduct caused significant harm to both B&G and Amedraa. At a minimum, respondent has deprived B&G of $241,980.43 and Amedraa of $157,444.40.

Lack of Recognition of Wrongdoing

As noted *ante*, the court finds that respondent's meritless and frivolous contentions that he is entitled to the interest income from the Cobalt CMO and FNMA CMO and that he was protected from B&G's, LNJ's, and Amedraa's adverse claims under UCC section 8502 establish that respondent fails to accept responsibility for his action and fails to appreciate the wrongfulness of his misconduct. Respondent's position would not be considered aggravating if it stemmed from an honest, but mistaken belief in his innocence. (See *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932.) But, as this court found *ante*, respondent does not hold an honest but mistaken belief in his innocence. In fact, there is simply no plausible basis for such a belief in this case.

In short, respondent's "failure to accept responsibility for actions which are wrong or to understand that wrongfulness [is] an aggravating factor. [Citations.]" (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 83.)

Mitigation

No Prior Record (Std. 1.2(e)(i).)

Respondent has no prior record of discipline. Thus, respondent is entitled to mitigation based on his 18 years of misconduct free practice even though the present misconduct is serious. As the review department noted in *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13, the Supreme Court has repeatedly given mitigation under standard 1.2(e)(i) for no prior record of discipline in cases in which the misconduct was serious. (E.g.,

Rodgers v. State Bar (1989) 48 Cal.3d 300, 317; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029.)

Discussion

Standard 1.3 provides that the primary purposes of disciplinary proceedings "are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession." In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

In the present proceeding, both standard 2.2(a) and standard 2.3 are relevant. Standard 2.2(a) provides:

> Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.

And standard 2.3 provides:

> Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law.

The State Bar recommends that respondent be disbarred. Respondent, on the other hand, argues for dismissal of all counts, or in the alternative, for stayed suspension. Neither party cites any case law to support its position. The court is unaware of any published case dealing with

similar acts of misconduct. Nonetheless, the court finds *In the Matter of Wyshak, supra*, 4 Cal. State Bar Ct. Rptr 70 and *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824 to be instructive on the level of discipline. The attorney in Wyshak was disbarred for serious misconduct in four matters, two of which involved defrauding the sellers in real estate transactions in which the attorney was acting as the escrow agent. The attorney in Priamos was disbarred for repeated acts of self-dealing with the client's property he managed and for unilaterally appropriating $450,000 of the client's property as management fees.

"Multiple acts of misconduct involving moral turpitude and dishonesty warrant disbarment. [Citations.]" (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45.) "It is clear that disbarment is not reserved just for attorneys with prior disciplinary records. [Citations.]" (*In the Matter of Wyshak, supra,* 4 Cal. State Bar Ct. Rptr. at p. 83.)

Significantly, respondent has not established any compelling mitigation to warrant a departure from the disbarment provided for in standard 2.2(a). Moreover, even though respondent was not acting as an attorney, respondent involved his practice of law by depositing and hiding the Cobalt CMO and the FNMA CMO in securities accounts that respondent opened, held, and controlled in the name of his law office. In addition, respondent displays a complete lack of insight and recognition of the wrongfulness of his misconduct. What is more, the record establishes that, after 23 years as member of the State Bar of California, respondent fails to understand and appreciate the basic duties of a fiduciary. Finally, respondent's misconduct displays a shocking lack of basic honesty.

The court concludes that, under the facts of this case, only disbarment will adequately fulfill the goals of attorney discipline in this proceeding. Accordingly, the court will recommend that respondent be disbarred and that he be ordered to make restitution with interest for the

$241,980.43 that he misappropriated in the Cobalt CMO matter and for the $157,444.40 that he misappropriated in the FNMA CMO matter.

Recommendations

Discipline

The court recommends that Respondent **JON A. DIVENS**, State Bar number 145549, be disbarred from the practice of law in California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state. The court further recommends that that **JON A. DIVENS** be ordered to make restitution to the following payees:

1. Betts and Gambles Investments, Inc. and Betts and Gambles Global Equities, jointly, in the amount of $241,980.43 plus 10 percent interest per year from October 31, 2009; and

2. Amedraa, LLC in the amount of $157,444.40 plus 10 percent interest per year from October 31, 2009.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

California Rules of Court, Rule 9.20

The court further recommends that JON A. DIVENS be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that JON A. DIVENS be involuntarily enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 5.111(D)).

Dated: April 17, 2013.

RICHARD A. PLATEL
Judge of the State Bar Court