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MIGUEL ROMANO, JR.
MEMBER

SOAH DOCKET NO. 312-15-1229

IN THE MATTER OF §
THE INVESTMENT ADVISER §
REGISTRATION OF MOWERY §
CAPITAL MANAGEMENT, LLC AND §
THE INVESTMENT ADVISER §
REPRESENTATIVE REGISTRATION §
OF FREDERICK EUGENE MOWERY §

BOARD ORDER NO. IC16-CAF-06

TO: Frederick Eugene Mowery, Managing Member
Mowery Capital Management, LLC (IARD No. 130761)
206 South Kentucky Street, Suite 201
McKinney, Texas 75069

Frederick Eugene Mowery (CRD No. 1246802)
206 South Kentucky Street, Suite 201
McKinney, Texas 75069

DISCIPLINARY ORDER

Statement of the Case

On November 17, 2014, the Texas State Securities Board Staff ("**Staff**") issued a Notice of Hearing to Mowery Capital Management, LLC ("**Respondent MCM**" or "**MCM**") and Frederick Eugene Mowery ("**Respondent Mowery**" or "**Mr. Mowery**") (collectively, "**Respondents**"), advising that the hearing would be held at the State Office of Administrative Hearings ("**SOAH**") before an Administrative Law Judge ("**ALJ**"). On February 27, 2015, the parties filed Stipulated Facts¹ in the matter. Specifically, the Staff and Respondents stipulated that the following facts are true and correct as described:

STIPULATED FACTS

1. From October 13, 2004 to November 6, 2008, Respondent MCM was registered with the Securities Commissioner as an investment adviser.

¹ The Stipulated Facts filed by the parties are recited below and vary from the "Stipulated Facts" that appear in the Proposal for Decision prepared by the ALJs dated July 31, 2015.

2. In November 2008, Respondent MCM transitioned from state registration to federal registration.
3. On November 6, 2008 Respondent MCM registered as an investment adviser with the U.S. Securities and Exchange Commission.
4. On June 25, 2012, Respondent MCM transitioned back to state registration and is currently registered as an investment adviser with the Securities Commissioner.
5. On October 13, 2004, Respondent Mowery registered with the Securities Commissioner as an investment adviser representative of Respondent MCM. This registration is currently effective.
6. From June 29, 2009 through November 19, 2014, Respondent Mowery was registered with the Securities Commissioner as an investment adviser representative of Worth Financial Group Inc.
7. Respondent MCM is an investment adviser and advises clients regarding investments in various securities, including stocks, bonds, and exchange-traded funds. These securities are purchased or sold through a brokerage account.
8. Respondents recommended the brokerage firm used in connection with the investment assets Respondents manage for clients.
9. Since at least July 1, 2007, the brokerage firm Respondents recommended for their clients has been Worth Financial Group, Inc. ("Worth").
10. Since at least July 1, 2007, securities transactions recommended by Respondents have been transacted through Worth.
11. Since at least July 1, 2007, Worth has earned compensation through charges associated with the trading activity in the accounts of Respondents' clients.
12. Respondent MCM entered into an agreement with Worth dated July 1, 2007. This agreement is referred to as the "Services Agreement" ("2007 Services Agreement").
13. The 2007 Services Agreement was in effect from July 1, 2007 to July 1, 2014.
14. Pursuant to the 2007 Services Agreement, Worth agreed to pay Respondent MCM in exchange for the following services: research on requested equities, bonds, and mutual fund, portfolio reports for certain clients of Worth, and advice on allocations for Worth customer accounts.
15. The 2007 Services Agreement between Respondent MCM and Worth did not specify a dollar amount or detail any rate associated with the payments from Worth to Respondent MCM.

16. Respondent Mowery determined the dollar amount listed on each invoice sent to Worth.
17. In or after July 2007, Respondents maintained investment management relationships with persons 65 years of age or older.
18. Respondents are fiduciaries to their advisory clients.
19. Respondents owe their advisory clients the duty to act in the clients' best interests.
20. Between July 2007 and November 2014, clients of the Respondents paid trade charges of \$51 per equity trade.
21. The Form ADV is a uniform form used in connection with investment advisers registering with securities regulators. There are two parts to the Form ADV.
22. Part 2 of the Form ADV is a disclosure document that investment advisers provide to their clients.
23. The Part 2 of the Form ADV is also commonly referred to as the "firm brochure" or "brochure."
24. Since 2011, the Part 2 has required disclosures to be made in narrative form and be in "plain English."
25. The Part 2 must also be filed with the appropriate securities regulator(s).
26. Starting in 2011, Respondent MCM filed the Part 2 with securities regulators and provided the Part 2 to Respondents' investment advisory clients.
27. Item 12 of the Form ADV Part 2A requires investment advisers to disclose practices in connection with the recommendation of brokerages for client transactions. In general, investment advisers are required to disclose factors considered in connection with such recommendations and to disclose certain potential conflicts of interests between clients and the investment adviser.
28. Since 2011, Respondent MCM's Form ADV Part 2A has included the following representation under the "Brokerage Practices" section: "[Respondent MCM] does not receive any portion of the trading fees."
29. Respondent MCM's Form ADV Part 2A has included the following representation under the "Asset Management" section: "Assets are invested primarily in exchange listed securities and exchange-traded funds, usually through discount brokers or fund companies."
30. From March 31, 2011 to on or about May 15, 2014, Respondent MCM's Form ADV Part 2B stated "Bankruptcy Petition: None" in a section related to Respondent Mowery.

31. Respondent Mowery filed a bankruptcy petition in or about September 2005.

32. In or about June 2012, Respondent MCM filed its Form ADV Part 2 with the Securities Commissioner in connection with Respondent MCM's application for registration as an investment adviser.

33. On April 30th, 2014, Respondent Mowery sent a document ("Research Item 1") to Worth via email. Research Item 1 is titled "The Interest Rate Trap" and includes a discussion about the interest rate environment and presents opinions as to its future impact on the stock market.

34. On May 12, 2014, Respondent Mowery sent a document ("Research Item 2"), via email, to Worth titled "A Better Safe Haven than Gold."

35. From at least in 2006 to in or about October 2014, Respondents included on Respondent MCM's website a section titled "Letter to Our Clients", which consisted of a writing focused primarily on macro-economic policy and bearing Respondent Mowery's name at the end of the "letter."

36. At times between 2004 and 2012, Respondent MCM compensated an individual (the "solicitor") in connection with clients that the solicitor referred to Respondent MCM.

37. Respondent MCM had agreed to pay the solicitor 30% of the fees collected by Respondent MCM from the clients referred by solicitor.

38. On April 25, 2014, among other records, Respondents submitted four documents representing disclosure notices (the "Notices") provided to clients referred to Respondent MCM by the solicitor.

39. All four of the Notices were signed by Respondent Mowery and the relevant client(s) in April 2014.

40. However, two (2) of the Notices (the "Dated Notices") included handwritten dates below the clients' signatures — December 12, 2005 and June 14, 2012.

After being rescheduled, a hearing on the merits was convened on March 9, 2015, with ALJs Henry D. Card and Steven M. Rivas presiding. Staff was represented by Deputy Commissioner Ronak V. Patel and Staff Attorney Callie Baker. Respondents were represented by attorney J. Kevin Edmundson. The hearing concluded on March 13, 2015, but the record did not close until June 2, 2015, after written closing and reply briefs were submitted by the parties.

The ALJs issued a Proposal for Decision ("**PFD**") on July 31, 2015. On August 14, 2015, Staff filed exceptions to the PFD. On September 1, 2015, Respondents filed a response to the Staffs' exceptions. The ALJs responded to the Staffs' exceptions and the Respondents' response by letter dated September 16, 2015, making changes to three Findings of Fact and one Conclusion of Law contained in the PFD. On January 5, 2016,

the Securities Commissioner remanded the case to the ALJs for possible additional findings and corrections. On February 22, 2016, the ALJs issued a letter further modifying the PFD by adding four additional Findings of Fact, modifying seven Conclusions of Law, and adding one Conclusion of Law.

Prior to issuing this Order, the Securities Commissioner, in accordance with the authority in Section 2001.058(e) of the Texas Government Code, further modified two Findings of Fact and six Conclusions of Law. The Findings of Fact and Conclusions of Law from the PFD, as modified by the ALJs and the Securities Commissioner, are as follows:

FINDINGS OF FACT

1. From October 13, 2004, to November 6, 2008, Mowery Capital Management, LLC ("**MCM**") was registered with the Securities Commissioner as an investment adviser.
2. In November 2008, MCM transitioned from state registration to federal registration.
3. On November 6, 2008, MCM registered as an investment adviser with the U.S. Securities and Exchange Commission.
4. On June 25, 2012, MCM transitioned back to state registration and is currently registered as an investment adviser with the Securities Commissioner.
5. On October 13, 2004, Frederick Eugene "Fritz" Mowery registered with the Securities Commissioner as an investment adviser representative of MCM. This registration is currently effective.
6. Mr. Mowery is an investment adviser and advises clients regarding investments in various securities, including stocks, bonds, and exchange-traded funds. These securities are purchased or sold through a brokerage account.
7. On April 9, 2014, Staff of the State Securities Board ("**SSB**" or "**Staff**") conducted an on-site routine examination of MCM's office in McKinney, Texas.
8. Following Staff's examination of MCM, Staff alleged Mr. Mowery and MCM committed several acts of fraud or engaged in fraudulent practices.
9. The alleged fraudulent acts included: breach of fiduciary duties, plagiarism, failure to disclose a conflict of interest, and misrepresentation of relevant and material facts.
10. SSB issued a Notice of Hearing to MCM on November 17, 2014.
11. The notice contained a statement of the time, place, and nature of the hearing, matters to be considered, the legal authority under which the hearing would be held, and the statutory provisions applicable to the matters to be considered.

12. The hearing convened on March 9-13, 2015, at the State Office of Administrative Hearings ("**SOAH**") in Austin, Texas, before SOAH Administrative Law Judges ("**ALJs**") Henry D. Card and Steven M. Rivas. Staff was represented by Staff Attorneys Ronak V. Patel and Callie Baker. MCM and Mr. Mowery appeared and were represented by attorney J. Kevin Edmundson. The record closed on June 2, 2015, after the parties submitted written closing briefs.

Breach of Fiduciary Duties in Recommending Worth

13. MCM was required to go through a broker-dealer to effectuate trading activity for MCM's clients.
14. Mr. Mowery was registered with the Securities Commissioner as an investment adviser representative of Worth Financial Group, Inc. ("**Worth**") from June 29, 2009 to November 19, 2014.
15. MCM recommended Worth as the broker-dealer used in connection with the investment assets MCM managed for its clients.
16. The only broker-dealer MCM ever considered for MCM's clients was Worth.
17. Prior to selecting Worth as the broker-dealer, Mr. Mowery knew that Worth was owned by a friend and former associate, Jim Clark.
18. Mr. Mowery built trust with Worth through conversations he had with Mr. Clark.
19. Trades for MCM's clients could be performed through Worth.
20. Worth provided personalized service to MCM.
21. Mr. Mowery did not review any records or conduct any research related to Worth prior to recommending Worth for MCM's clients.
22. Worth used Maplewood, an introducing broker-dealer, through which it placed trades for MCM's clients.
23. Mr. Mowery and Mr. Clark negotiated a trading charge of \$51 per equity trade that MCM's clients would pay Worth for each securities transaction MCM initiated on their behalf.
24. Mr. Mowery was comfortable using Worth, and did not verify whether another broker-dealer could charge a lesser amount than Worth.
25. Worth, Maplewood, and National Financial Services ("**NFS**") each shared a portion of the \$51 trading charge.

26. MCM's clients trusted Mr. Mowery's decision to do business with Worth and were pleased with how MCM handled their investments.
- 26A. The evidence did not show that MCM's selection of Worth as its broker-dealer caused economic loss or potential economic loss to MCM's clients who were 65 years of age or older.

Plagiarism

27. From 2006 to 2014, MCM included on its website a section titled "Letter to Our Clients."
28. The substance of the letter was based on an article titled "What Have We Learned?" written by Larry Kudlow, and published on December 29, 1999.
29. Mr. Mowery committed plagiarism by placing his signature block at the conclusion of the letter to make it appear as if he drafted it.
30. The substance of the letter was a background of the securities industry and economic trends of the 20th century.
31. The document itself offered no guidance or advice that any of MCM's clients were directed to follow or adhere.
32. Mr. Mowery misrepresented the fact that he drafted the letter.
33. On April 30, 2014, Mr. Mowery sent an email to Mr. Clark with the title "The Interest Rate Trap" written on the subject line.
34. The email had an attachment containing research on interest rates. The research contained in the email attachment was taken from an article written by Mitch Zacks of Zacks Investment Management titled "Danger Watch Out for Interest Rates."
35. Mr. Mowery cut-and-pasted Mr. Zacks' article, made a minor change, and added a signature block at the conclusion of the article to make it appear as if he performed the research on interest rates.
36. On May 12, 2014, Mr. Mowery sent an email to Mr. Clark with the title "A Better Safe Haven than Gold" written on the subject line.
37. The email had an attachment containing research on gold investments. The research contained in the email attachment was taken from an article written by Chris Phillip of Vanguard.
38. Mr. Mowery cut-and-pasted Mr. Phillip's article, made a minor change, and added a signature block at the conclusion of the article to make it appear as if he drafted the article on gold investments.

39. The two emails Mr. Mowery sent to Mr. Clark presented research that aligned with Mr. Mowery's view on interest rates and gold.
40. Mr. Mowery misrepresented the authorship of the research contained in the email attachments.
41. The subject matter of the emails was an accurate reflection of Mr. Mowery's opinions upon which Mr. Clark could rely.

Failure to Disclose 2007 Services Agreement with Worth

42. As part of the state registration process, registrants are required to file Form ADV with the SSB.
43. There are two portions of an ADV. The first is an online portion with questions and answers to click on. The second is a narrative document (the "**brochure**") that discusses the investment adviser's business and discloses conflicts of interest.
44. MCM prepared a brochure, filed it with the SSB, and provided it to its clients.
- 44A. Some of the clients to whom the brochure was provided were 65 years of age or older.
45. MCM's brochure contained the following language regarding the advisory services agreement:

Advisory Services Agreement

For some corporate clients, MOWERY CAPITAL MANAGEMENT, LLC provides portfolio research and analysis, asset allocation recommendations, and performance accounting using the ADVENT system.

The fees for this service vary with the amount of work involved and are billed monthly. (Bold-face and capitalization in original.)

46. The Advisory Services Agreement section of MCM's brochure did not mention Worth.
47. MCM does not have similar advisory services agreements with other entities.
48. MCM's clients did not have actual notice, either through the brochure or otherwise, that the Advisory Services Agreement was with Worth.
49. Mr. Mowery's business partner in MCM, Charles Waring, created the MCM brochure using a general template he had purchased and adapting it to the specifics of MCM's business.

50. The brochure filed with the SSB was the first narrative brochure MCM had been required to file with financial regulators.
51. The brochure template did not contain any reference to the type of advisory services agreement that existed between MCM and Worth. Therefore, Mr. Waring created the language regarding the agreement that appears in the brochure.
52. A draft brochure MCM submitted to the SSB staff had contained a specific reference to Worth in a different section related to affiliations.
53. After discussions with the SSB staff, MCM made proposed edits to the draft brochure set forth below:

Affiliations

MOWERY CAPITAL MANAGEMENT, LLC has arrangements that are material to its advisory business or its clients with a related person who is a broker-dealer, investment company, other investment advisor, financial planning firm, commodity pool operator, commodity trading adviser or futures commission merchant, banking thrift institution, accounting firm, law firm, insurance company or agency, pension consultant, real estate broker or dealer, or an entity that creates or packages limited partnerships.

(name each as applicable) Insurance Agency - Mr. Mowery is a licensed insurance agency with Seacoast Financial Network, LLC. ~~Delete-introducing Broker-Dealer - Worth Financial Group, Inc.~~ (Strike-through in original.)

54. After further email discussions between Mr. Waring and the staff, the final, filed Affiliations section of the brochure read as follows:

Affiliations

MOWERY CAPITAL MANAGEMENT, LLC has arrangements that are material to its advisory business or its clients with an insurance company or agency (name each as applicable) Insurance Agency - Mr. Mowery is a licensed insurance agency with Seacoast Financial Network, LLC.

55. Registrants commonly make mistakes in the drafting of their brochures.
56. MCM intentionally did not mention Worth in the Advisory Services Agreement section of its brochure.
57. The 2007 Services Agreement between MCM and Worth was a potential conflict of interest.

58. Two former MCM investors would have considered the 2007 Services Agreement with Worth in deciding whether to invest with MCM. Both would have objected to that arrangement.
59. There was a substantial likelihood that the advisory services agreement between MCM and Worth would have assumed actual significance in the deliberations of a reasonable investor.
60. The 2007 Services Agreement with Worth was a material fact that should have been disclosed by MCM.
61. If MCM had intended to deceive the public about its relationship with Worth, it would not have included a specific reference to Worth in the Affiliations section of the draft brochure.
62. During the initial audit of MCM by Staff, Mr. Mowery did not try to hide the 2007 Services Agreement, but instead freely described the agreement.
63. MCM did not intend to deceive or defraud its clients or the public regarding the 2007 Services Agreement with Worth.

Alleged Misrepresentations in the Brochure

Trading fees

64. MCM's brochure contained the following statement:

MOWERY CAPITAL MANAGEMENT, LLC reviews the execution of trades at each custodian each quarter. The review is documented in the MOWERY CAPITAL MANAGEMENT, LLC Compliance Manual. Trading fees charged by the custodians is (sic) also reviewed on a quarterly basis. MOWERY CAPITAL MANAGEMENT, LLC does not receive any portion of the trading fees.² (Capitalization in original.)

65. MCM and Worth did not have an agreement for Worth to pay MCM based on the trading commissions Worth received through MCM.
66. The evidence did not show any relationship between the MCM-related commissions each month and the amounts billed by MCM under the advisory services agreement.
67. The statement in the brochure that MCM "does not receive any portion of the trading fees" was not a misrepresentation of a relevant fact.

² Staff Ex. 3 at 46.

Discount Brokers

68. MCM's brochure included the following statement:

Assets are invested primarily in exchange listed securities and exchange-traded fund, usually through discount brokers or fund companies.

69. The term "discount broker" is not defined in the Act, the ADV instructions, or federal law.

70. MCM's clients were fully informed of the cost of their trades.

71. MCM's use of the term "discount brokers" in its brochure was not a misrepresentation of a relevant fact.

71A. The evidence did not show that MCM's use of the term "discount brokers" caused economic loss or potential economic loss to MCM's clients who were 65 years of age or older.

Mr. Mowery's 2005 Bankruptcy Petition

72. Mr. Mowery filed a bankruptcy petition in or around September 2005.

73. The MCM brochure contained a section setting out personal information about Mr. Mowery. That section included the following statement: "Bankruptcy Petition: None."

74. Several of MCM's clients were aware of Mr. Mowery's bankruptcy petition, but others were not. Two of MCM's former clients stated that awareness of that petition could have affected their decisions to employ MCM.

75. Mr. Mowery's bankruptcy petition was a relevant fact that MCM misrepresented in the brochure.

76. MCM failed to list Mr. Mowery's 2005 bankruptcy in its U4 form, also filed with the Board and revised a number of times.

77. The negative answer to the bankruptcy question was in the original template that Mr. Waring used to create the MCM brochure.

78. MCM's misrepresentation of the bankruptcy filing was not intentional.

Misrepresentations During Staff Investigation

Altered Disclosure Documents

79. At times between 2004 and 2012, MCM compensated a solicitor in connection with clients that the solicitor referred to MCM.
80. Under an agreement, MCM paid the solicitor 30 percent of the fees collected by MCM from the clients referred by the solicitor.
81. During its investigation, Staff requested certain information and documents from MCM to determine if MCM had disclosed the solicitor compensation arrangement in writing to the relevant clients.
82. Among the documents requested, Staff sought any records provided to the clients that disclosed the compensation arrangement.
83. On April 25, 2014, among other records, MCM submitted documents representing disclosure notices provided to clients referred to MCM by the solicitor. All of the notices were signed by Mr. Mowery and the relevant client(s).
84. Two of the notices included handwritten dates below the clients' signatures.
85. The notice signed by D. Stephen Ross was hand-dated "12-12-05," which was the date on which Mr. and Mrs. Ross entered into their investment advisory ("IA") agreement with MCM.
86. The notice signed by Richard and Drew Allen was hand-dated "6/14/12," which was the date on which Mr. and Mrs. Allen entered into their IA agreement with MCM.
87. MCM also submitted other notices, which were not dated.
88. In a follow-up request, Staff sought information about the undated notices and was told by Mr. Mowery on MCM's behalf that they were signed in April of 2014.
89. In the follow-up request, Staff asked MCM why the undated notices had not been signed when those clients entered into those agreements.
90. Mr. Ross and Mr. and Mrs. Allen signed their written disclosures in April 2014, rather than at the times they entered into their IA agreements.
91. In his response, Mr. Mowery did not inform Staff that the Ross and Allen disclosure notices had been signed in April of 2014.
92. Mr. Mowery's response implied the notices had also been signed on the dates shown.

93. Sometime in May of 2014, Staff began to believe that Mr. Mowery had altered the Ross and Allen disclosures.
94. At a subsequent meeting, which took place on or around May 23, 2014, Mr. Mowery admitted having altered the Ross and Allen disclosure documents.
95. Mr. Mowery removed both an old address and his current address from the bottom of the documents.
96. It would have been obvious that the disclosures were signed after 2013 if MCM's current address had appeared on those documents.
97. Staff was investigating the issue of whether the solicitor relationship was disclosed to clients at the time they entered into the advisory relationship with MCM.
98. By altering the disclosure notice documents, Mr. Mowery was trying to leave the false impression that the written disclosures had been provided to the Rosses and the Allens at the time they signed their IA agreements.
99. By altering the two documents, Mr. Mowery made material misrepresentations to Staff during the course of its investigation.

“Letter to Our Clients”

100. In November 2014, during the initial investigation, Mr. Mowery told Staff he transcribed the “Letter to Our Clients” that was placed on MCM's website in 2004 from notes he took at an oral presentation given by Mr. Kudlow at a seminar in Dallas in the early to mid-2000s.
101. Mr. Mowery testified he had transcribed the oral presentation “word for word” to the best of his ability.
102. Although Mr. Kudlow spoke in Dallas at the Federal Reserve Bank in 1999, he did not read directly from the article in question, which was published seven or eight weeks later on Schroder & Company's and American Skandia's websites.
103. The original source of the letter on MCM's website was Mr. Kudlow's article, not notes from an oral presentation.
104. In his investigative testimony in November 2014, Mr. Mowery did not state he took Mr. Kudlow's ideas and wrote his own original work based on those ideas.
105. There is not a material difference between copying an article and transcribing a speech word for word without proper attribution.
106. Mr. Mowery's misrepresentation regarding the source of the letter was not a material misrepresentation.

Sanctions

Cease and Desist Order

107. MCM has corrected its brochure to show Mr. Mowery's 2005 bankruptcy petition.
108. The record does not show whether the Advisory Services Agreement portion of the brochure has been changed to explicitly state that the revised agreement is with Worth.

Altered Disclosure Documents

109. The presentation of the altered disclosure documents was a serious matter that had at least the potential for harming the investigation into the referrals by the solicitor.
110. Mr. Mowery has no history of violations.
111. At the time he presented the altered documents to Staff, Mr. Mowery was a central figure in a harsh, negative, highly publicized political campaign; his son was on trial for intoxication manslaughter, of which he later was convicted; he was dealing with the care of his father and his disabled brother; and he was ill with what was eventually diagnosed as prostate cancer.
112. The evidence does not show that Mr. Mowery or MCM gained any direct economic benefit from the presentation of the altered disclosure documents to Staff during its investigation.
113. The presentation of the altered disclosure documents was committed against Staff, rather than a person 65 or older.
114. Although Mr. Mowery admitted he had altered the documents, he did so only after he was confronted by Staff.

Intentional Failure to Disclose a Material Fact and Misrepresentation of a Relevant Fact

115. Whether MCM intended to deceive or defraud should be considered in determining the sanctions to be imposed for MCM's intentional failure to disclose a material fact with regard to the 2007 Services Agreement.
116. Whether MCM intended to deceive or defraud should be considered in determining the sanctions to be imposed for MCM's misrepresentation of a material fact in its brochure.
117. The evidence did not show any actual harm to MCM's clients or the public from MCM's failure to disclose that the Advisory Services Agreement disclosed in the brochure was with Worth.

118. The evidence did not show any actual harm to MCM's clients or the public from MCM's misrepresentation in the brochure regarding the bankruptcy petition.
119. MCM cooperated with Staff in its investigation of MCM's failure to disclose the 2007 Services Agreement with Worth and the misrepresentation regarding the bankruptcy petition in the brochure.
120. The evidence did not show the extent, if any, that MCM's failure to disclose the 2007 Services Agreement with Worth or its misrepresentation regarding the bankruptcy petition actually benefitted MCM financially.
- 120A. MCM's failure to disclose the 2007 Services Agreement with Worth and its misrepresentation regarding the bankruptcy filing were acts committed against persons 65 years of age or older.
121. The evidence did not show that MCM's failure to disclose the 2007 Services Agreement with Worth or its misrepresentation regarding the bankruptcy filing caused economic loss or potential economic loss to any of MCM's clients, whether over 65 or under.

Hearing Transcription Costs

122. Both parties were responsible for the length and cost of the hearing.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over Mr. Mowery, MCM, and the subject matter of this disciplinary action pursuant to Article 581-1 *et seq.* of the Texas Securities Act (the "**Act**").
2. SOAH has jurisdiction over matters related to the hearing in this disciplinary proceeding, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to Chapter 2003 of the Texas Government Code.
3. MCM received proper notice of hearing. Tex. Gov't Code §§ 2001.051-.052.
4. Staff has the burden of proof in this matter under Articles 581-14, 581-23, and 581-23-1 of the Act.
5. "Scienter," or the intent to deceive or defraud, is not required to prove fraud or fraudulent business practices under Articles 581-4.F, 581-14(3), 581-14(7), or 581-23(A)(1) of the Act.
6. Mr. Mowery and MCM engaged in fraud, as that term is defined in Article 581-4.F of the Securities Act, by considering only Worth as MCM's broker-dealer.

7. Mr. Mowery did not engage in fraud by failing to review Mr. Clark's regulatory history before choosing Worth as its broker-dealer under Article 581-4.F of the Act.
8. Mr. Mowery did not engage in fraud, pursuant to Article 581-4.F of the Act, by negotiating a \$51 trading charge with Worth for each securities transaction MCM's clients would pay.
9. MCM and Mr. Mowery's plagiarism of Mr. Kudlow's article was a misrepresentation of relevant fact pursuant to Article 581-14.A(3).
10. Mr. Mowery engaged in fraudulent practices pursuant to Article 581-14.A(3) by plagiarizing the two emails he sent to Mr. Clark.
11. MCM and Mr. Mowery, as its owner, violated Article 581-14.A(3) of the Act by intentionally failing to disclose that the advisory services agreement was with Worth.
12. MCM did not violate Article 581-14.A(3) of the Act by stating in its brochure that MCM "does not receive any portion of the trading fees."
13. MCM did not violate Article 581-14.A(3) of the Act by stating in its brochure that MCM's assets "are invested primarily in exchange listed securities and exchange-traded fund, usually through discount brokers or fund companies."
14. MCM and Mr. Mowery, as its owner, violated Article 581-14.A(3) of the Act by stating in its brochure that Mr. Mowery had not filed a bankruptcy petition.
15. Mr. Mowery violated Article 581-14.A(7) of the Act by presenting the two altered disclosure notice documents to Staff during its investigation.
16. Mr. Mowery's testimony to Staff during the investigation regarding the "Letter to Our Clients" that was placed on MCM's website in 2004 did not violate Article 581-14.A(7) of the Act.
17. MCM and Mowery should be ordered, pursuant to Section 23.B(1) of the Act, to immediately cease and desist from engaging in any fraudulent conduct in connection with rendering services as an investment adviser.
18. The Commissioner has the authority to revoke MCM's and Mr. Mowery's registrations for the multiple violations of Article 581-14.A(3) set forth in these Conclusions of Law.
19. The Commissioner has the authority to revoke Mr. Mowery's registrations for the two violations of Article 581-14.A(7) set forth in these Conclusions of Law.
20. The Commissioner has the authority to assess administrative fines against MCM and Mr. Mowery for the violations of Article 581-14.A(3) and (7) set forth in these Conclusions of Law.

21. MCM's and Mr. Mowery's registrations should not be revoked for the violations of Article 581-14.A(3).
22. MCM's and Mr. Mowery's registrations should not be revoked for the violations of Article 581-14.A(7).
23. Pursuant to Article 581-23-1.A(3), Mr. Mowery should be assessed an administrative fine of \$20,000 for each of the two violations of Article 581-14.A(7).
24. Pursuant to Article 581-23-1.A(1)(B), MCM and Mr. Mowery jointly should be assessed an administrative fine of \$10,000 for each of the four violations and Mr. Mowery should be assessed an additional administrative fine of \$10,000 for his separate violation of Article 581-14.A(3).
- 24A. Because there was no intent to deceive or defraud and no evidence of actual harm to clients or the public, an additional penalty amount should not be added pursuant to Article 581-23-1.B(2) for the two violations of Article 581-14.A(3) that were committed against persons 65 years of age or older.
25. One-half of the court reporting transcription costs should be assessed against MCM and one-half should be paid by SSB.

MODIFICATIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the provisions of Government Code Section 2001.058, the Commissioner has modified the ALJ's Findings of Fact and Conclusions of Law as follows:

Finding of Fact 32

As submitted by the ALJs in the modified PFD, proposed Finding of Fact 32 reads as follows:

32. Mr. Mowery misrepresented the point that he drafted the letter, but the material contained in the letter was not a relevant fact.

It has been modified to properly apply Sections 14.A(3) and 4.F of the Act to the specific allegations made in the Notice of Hearing. The legal basis for the change is that Respondents were charged with: 1) the use of written material by others without citing to the source documents or otherwise attributing the work to the original authors; and 2) copying material written by others and presenting the writings as those of Respondent Mowery without citing to the source documents or otherwise attributing the work to the original authors. The relevant fact relating to these allegations is the authorship of the writings not the content.

Finding of Fact 40

As submitted by the ALJs in the modified PFD, proposed Finding of Fact 40 reads as follows:

40. Although Mr. Mowery misrepresented the authorship of the research contained in the email attachments, he adopted the opinions and interpretations proffered by the research.

It has been modified to properly apply Sections 14.A(3) and 4.F of the Act to the specific allegations made in the Notice of Hearing. The legal basis for the change is that Respondents were charged with: 1) the use of written material by others without citing to the source documents or otherwise attributing the work to the original authors; and 2) copying material written by others and presenting the writings as those of Respondent Mowery without citing to the source documents or otherwise attributing the work to the original authors. The relevant fact relating to these allegations is the authorship of the writings not the content.

Conclusion of Law 6

As submitted by the ALJs in the modified PFD, proposed Conclusion of Law 6 reads as follows:

6. Mr. Mowery did not engage in fraud by considering only Worth as MCM's broker-dealer as that term is defined in Article 581-4.F of the Act.

This Conclusion of Law has been modified. Prior to the SOAH hearing, Staff and Respondents stipulated that Respondents are fiduciaries to their advisory clients, and Respondents owe their advisory clients the duty to act in the clients' best interests. Stipulated Facts 18 and 19.

Staff and Respondents further stipulated that Respondent MCM entered into an agreement (the "2007 Services Agreement") with Worth that was in effect from July 1, 2007 to July 1, 2014, and that pursuant thereto, Worth agreed to pay Respondent MCM in exchange for the following services: research on requested equities, bonds, and mutual funds, portfolio reports for certain clients of Worth, and advice on allocations for Worth customer accounts. Stipulated Facts 12, 13, and 14. In their PFD, the ALJs found that Respondents' advisory clients did not have actual notice that there was an agreement with Worth and that the agreement between MCM and Worth was a potential conflict of interest. Finding of Fact 48 and 57.

The ALJs found that prior to recommending Worth for MCM's clients, Mr. Mowery did not review any records or conduct any research related to Worth. Finding of Fact 21. Furthermore, Mr. Mowery did not verify whether another broker-dealer could charge a lesser amount (per equity trade) than Worth. Finding of Fact 24. Instead, Mr. Mowery and Mr. Clark negotiated a trading charge of \$51 per equity trade that MCM's clients would pay Worth for each securities transaction MCM initiated on their behalf. Finding of Fact 23.

The ALJs found that the only broker-dealer MCM ever considered for MCM's clients was Worth. Finding of Fact 16. Given the parties' stipulations and the findings of fact, the question is whether Respondents acted in the clients' best interests by considering only Worth as MCM's broker-dealer.

In finding that Mowery did not engage in fraud, as that term is defined in Article 581-4.F, by considering only Worth as MCM's broker dealer, the ALJs did not properly apply the applicable law to these facts. The ALJs required proof of specific fraudulent behavior amounting to misrepresentations of relevant fact or intentional failures to disclose material fact applicable to a case involving actual fraud rather than breach of fiduciary duty. See pg. 11 of the PFD. Section 4.F of the Act defines the terms "fraud" and "fraudulent practice" to cover certain enumerated activities including a misrepresentation of a relevant fact and intentional failure to disclose a material fact. However, Section 4.F also states that "nothing herein shall limit or diminish the full meaning of the terms 'fraud,' 'fraudulent,' and 'fraudulent practice' as applied or accepted in courts of law or equity."

The term "fraud," as applied or accepted in courts of law or equity, includes both actual and constructive fraud. See *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964). Unlike actual fraud, which usually involves dishonesty of purpose or intent to deceive, constructive fraud is "the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Id.* In other words, constructive fraud is the breach of a legal or equitable duty that the law declares fraudulent because it violates a fiduciary relationship. *Hubbard v. Shankle*, 138 S.W.3d 474, 483 (Tex. App.—Fort Worth 2004, pet. denied).

In *SEC v. Capital Gains Research Bureau, Inc.*, the U.S. Supreme Court surveyed the judicial treatment of common-law fraud and found that "Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." 375 U.S. 180, 194 (1963).

Respondents³ breached their fiduciary duty to their advisory clients, thereby committing constructive fraud, by only ever considering Worth as MCM's broker-dealer. As investment advisers, Respondents have a fiduciary duty not only to make ongoing good faith determinations that trading costs remain reasonable in relation to brokerage services received in the context of the overall market for such services provided by securities dealers, but to also follow a good faith process to evaluate all business relationships to ensure that the value of client portfolios are maximized and that conflicts of interest are avoided. This is particularly so in the case of an investment adviser who, without disclosure to his advisory clients, profits from a pre-existing business relationship with the brokerage firm he recommends for his advisory clients.

³ MCM has been added to this Conclusion of Law as the Notice of Hearing alleged that both Respondents breached their fiduciary duty to clients, forming the basis for this Article 581-14.A(3) violation, and because it is supported by the relevant Stipulated Facts and Findings of Fact referenced above.

This change necessitates related modifications to Conclusions of Law 18 and 24 to reflect these additional violations of Article 581-14.A(3) by MCM and Mr. Mowery.

Conclusion of Law 9

As submitted by the ALJs in the modified PFD, proposed Conclusion of Law 9 reads as follows:

9. Mr. Mowery's plagiarism of Mr. Kudlow's article was not a misrepresentation of a relevant fact.

It has been modified to properly apply Sections 14.A(3) and 4.F of the Act to the specific allegations made in the Notice of Hearing. The legal basis for the change is that Respondents were charged with: 1) the use of written material by others without citing to the source documents or otherwise attributing the work to the original authors; and 2) copying material written by others and presenting the writings as those of the Respondent Mowery without citing to the source documents or otherwise attributing the work to the original authors.

The relevant fact relating to these allegations is the authorship of the writings (MCM and Mr. Mowery's plagiarism, as established in Stipulated Fact 35 and Findings of Fact 27, 29, and 32) not whether the content aligns with the views of Respondents. The dissemination of plagiarized material to clients under the signature block of Mr. Mowery in the letter constitutes fraud for purposes of Article 581-4.F of the Act.

The Notice of Hearing alleged that both Respondents engaged in the fraudulent practices that form the basis for this Article 581-14.A(3) violation and supported by the relevant Stipulated Facts and Findings of Fact referenced above. The evidence presented at the hearing related to plagiarism in connection with the letter to clients justifies finding that both Respondents engaged in fraudulent practices, so this Conclusion of Law has been modified to also include MCM.

This change necessitates related modifications to Conclusions of Law 18 and 24 to reflect these additional violations of Article 581-14.A(3) by MCM and Mr. Mowery.

Conclusion of Law 10

As submitted by the ALJs in the modified PFD, proposed Conclusion of Law 10 reads as follows:

10. Mr. Mowery did not engage in fraudulent practices by plagiarizing the two emails he sent to Mr. Clark because his opinions and conclusions were not misrepresented in the emails.

This Conclusion of Law was modified to properly apply Sections 14.A(3) and 4.F of the Act to the specific allegations made in the Notice of Hearing. The legal basis for the change is that Respondents were charged with: 1) the use of written material by others without

citing to the source documents or otherwise attributing the work to the original authors; and 2) copying material written by others and presenting the writings as those of Respondent Mowery without citing to the source documents or otherwise attributing the work to the original authors.

The relevant fact relating to these allegations is the authorship of the writings (Mr. Mowery's plagiarism, as established in Finding of Fact 40) not whether the content aligns with the views of Respondents. The dissemination of plagiarized material to clients under the signature block in the documents sent by Mr. Mowery constitutes fraud for purposes of Article 581-4.F of the Act.

The Notice of Hearing alleged that both Respondents engaged in the fraudulent practices that form the basis for this Article 581-14.A(3) violation; however, the relevant Stipulated Facts (Nos. 33 and 34) and Findings of Fact by the ALJs (Nos. 33, 35, 36, 38, and 39) mention only Mr. Mowery. Although the evidence presented at the hearing related to plagiarism in connection with the letter to clients and emails would appear to justify both Respondents engaged in fraudulent practices, this Conclusion of Law has not been modified to include MCM in the absence of Findings of Fact that support its inclusion.

This change necessitates related modifications to Conclusions of Law 18 and 24 to reflect this additional violation of Article 581-14.A(3) by Mr. Mowery.

Conclusion of Law 17

As submitted by the ALJs in the modified PFD, proposed Conclusion of Law 17 reads as follows:

17. MCM should be ordered, pursuant to Article 581-23.B(1) of the Act, to amend its brochure to show that the advisory services agreement referenced therein is between MCM and Worth.

The Commissioner modified the Conclusion of Law to reflect the legal powers of the Commissioner under Section 23.B(1) of the Act. The Commissioner has authority to require an investment adviser or investment adviser representative to immediately cease and desist from fraudulent conduct, but does not give the Commissioner authority to require it to amend its filings, although amendment of such filings may be a method by which the adviser or representative chooses to stop engaging in fraudulent conduct. The Conclusions of Law in this case reveal that the Respondents have engaged in fraudulent conduct addressed by Section 14.A(3) and 14.A(7) of the Act, and are subject to administrative fines assessed pursuant to Section 23-1.A(1)(B).

Conclusion of Law 18

As submitted by the ALJs in the modified PFD, proposed Conclusion of Law 18 reads as follows:

18. The Commissioner has the authority to revoke MCM's and Mr. Mowery's registrations for the two violations of Article 581-14.A(3) set forth in these Conclusions of Law.

It has been modified to include the violation(s) of Article 581-14.A(3) reflected in Conclusions of Law 6, 9, and 10 as modified by the Securities Commissioner.

Conclusion of Law 24

As submitted by the ALJs in the modified PFD, proposed Conclusion of Law 24 reads as follows:

24. Pursuant to Article 581-23-1.A(1)(B), MCM and Mr. Mowery jointly should be assessed an administrative fine of \$10,000 for each of the two violations of Article 581-14.A(3).

It has been modified to include fines for the violation(s) of Article 581-14.A(3) reflected in Conclusions of Law 6, 9, and 10 as modified by the Securities Commissioner.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Securities Commissioner concludes that the Respondents have violated Sections 14.A(3) and (7) of the Texas Securities Act, providing grounds for sanctions under Sections 14, 23, and 23-1 of the Act.

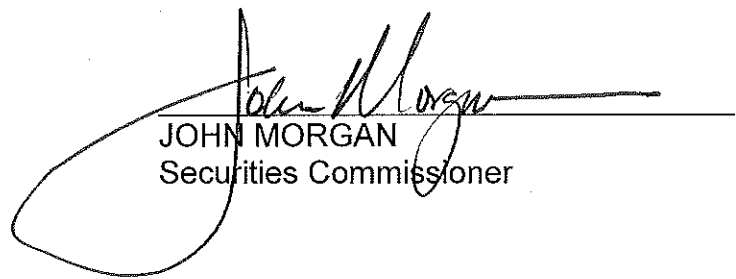
IT IS THEREFORE ORDERED pursuant to Section 23.B(1) of the Act, that MOWERY CAPITAL MANAGEMENT, LLC, and FREDERICK EUGENE MOWERY immediately CEASE AND DESIST from engaging in any fraudulent conduct enumerated herein in connection with rendering services as an investment adviser.

IT IS FURTHER ORDERED, pursuant to Section 23-1.A(1)(B) of the Act, that FREDERICK EUGENE MOWERY is assessed an administrative fine of \$20,000 for each of the two violations of Article 14.A(7) of the Act. Payment shall be made by delivery of a cashier check in the amount of \$40,000 payable to the State of Texas for deposit into the General Revenue Fund, within 15 days after this Order becomes final.

IT IS FURTHER ORDERED, pursuant to Section 23-1.A(1)(B) of the Act, that MOWERY CAPITAL MANAGEMENT, LLC, and FREDERICK EUGENE MOWERY are jointly assessed an administrative fine of \$10,000 for each of the four violations of Article 581-14.A(3) of the Act and FREDERICK EUGENE MOWERY is assessed an administrative fine of \$10,000 for his separate violation of 581-14.A(3). Payment shall be made by delivery of cashier's checks totaling the amount of \$50,000 payable to the State of Texas for deposit into the General Revenue Fund, within 15 days after this Order becomes final.

IT IS FURTHER ORDERED, pursuant to 7 TAC §105.13, that one-half of the court reporting transcription costs should be assessed against MOWERY CAPITAL MANAGEMENT, LLC in the amount of \$2,930.37. Payment shall be made by delivery of a cashier's check in this amount payable to the State of Texas for deposit into the General Revenue Fund, within 15 days after this Order becomes final.

SIGNED and ENTERED by the Securities Commissioner this 18th day of March, 2016.


JOHN MORGAN
Securities Commissioner

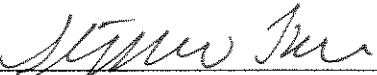
CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been sent to the Respondents by certified mail, return receipt requested, at their last known addresses on Page 1 of this Order; to the Respondents' attorney of record via email and certified mail, return receipt requested to his addresses that appear below; to the Staff by hand-delivery; and by interagency mail to the State Office of Administrative Hearings, at the address noted below, on this the 18 day of March, 2016.

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