BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of THE CALIFORNIA CORPORATIONS COMMISSIONER, Complainant, vs. MITCHELL M. MAYNARD (TERRA VISTA FINANCIAL PLANNERS, DBA); MITCHELL M. MAYNARD, as an individual; and DORICE A. MAYNARD, as an individual, Respondents.	Case No.: 923-4433 OAH No.: L2007070296

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Commissioner of Corporations as his Decision in the above-entitled matter.

This Decision shall become effective on OCTOBER 16, 2007.

IT IS SO ORDERED this 15th day of OCTOBER 2007.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

BEFORE THE DEPARTMENT OF CORPORATIONS

OF THE STATE OF CALIFORNIA

In the Matter of **THE CALIFORNIA CORPORATIONS COMMISSIONER,** **Complainant,** **v.** **MITCHELL M. MAYNARD (TERRA VISTA FINANCIAL PLANNERS, DBA); MITCHELL M. MAYNARD, as an individual; and DORICE A. MAYNARD, as an individual,** **Respondents.**	**Case No. 923-4433** **OAH No. L2007070296**

PROPOSED DECISION

This matter came on regularly for hearing on July 31, 2007, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

California Corporations Commissioner, Preston DuFauchard, (Complainant or Commissioner) was represented by Blaine A. Noblett, Corporations Counsel.

Mitchell M. Maynard and Dorice A. Maynard (respondents) were present and represented themselves.

Oral and documentary evidence was received. On July 31, 2007, the record was closed, and the matter was submitted for decision.

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FACTUAL FINDINGS

The Administrative Law Judge makes the following factual findings:

1. Respondents are husband and wife. Respondent Mitchell M. Maynard has applied for an investment adviser certificate which the Department of Corporations (Department) has declined to issue. Respondents do not dispute the factual allegations in the Statement of Issues. However, they argue that the Department is under a number of "misconceptions" concerning the facts underlying the causes for denial of the application for investment adviser certificate and the prayer that respondents be barred from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser. Respondents also argue that they should not be so barred because that bar would exceed the one imposed by their discipline in a sister state. Because the facts are not in dispute, the factual allegations in the Statement of Issues are repeated verbatim below and are incorporated herein as factual findings:

> 3. Terra Vista Financial Planners is a California sole proprietorship and was located at 11249 Amiata Drive, Rancho Cucamonga, California 91730.
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> 4. Respondents jointly filed for a Chapter 7 voluntary bankruptcy on September 10, 2002 with the United State[s] Bankruptcy Court, Central District of California (Riverside). Respondents' debts were discharged by final decree issued by the Court on or about December 26, 2002.
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5. In February 1999, Respondents created Leveraged Index Management Company (LIMCO), an investment advisory firm incorporated in the State of Vermont. Mitchell M. Maynard was LIMCO's controlling officer, president, treasurer, and investment adviser representative. Dorice A. Maynard acted as LIMCO's vice president and secretary. From February 1999 until June of 2000, LIMCO was located in Vermont. Thereafter, the Respondents relocated to California, where they continued to run LIMCO until it ceased operations sometime in early 2001. On or about July 17, 2001, the State of Vermont Department of Banking, Insurance, Securities, and Health Care Administration, Securities Division ("Vermont Securities Administration"), notified Mitchell M. Maynard that he was under investigation for his activities as the principal of LIMCO. He was requested at that time to immediately provide an amendment to his U-4[1], disclosing that he was subject to an investigation by the Vermont Securities Administration.

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[1] [3] Form U-4 is used by broker-dealers, *i.e.*, persons engaged in the business of effecting transactions in securities for the account of others or their own account, to register and terminate the registrations of associated persons with self-regulatory organizations and the subject jurisdiction.

6. On or about December 11, 2001, Terra Vista and Respondents filed an application for an investment adviser certificate with the Department. The application lists the Respondents, Mitchell M. Maynard and Dorice A. Maynard, as Terra Vista's direct owners and executive officers. At the disclosure history section of the application, Part 1 A, Item 11.G., Terra Vista was asked if it "or any *advisory affiliate*[2] now [*sic*] the subject of a regulatory *proceeding*[3] that could lead to a 'yes" answer to any part of item . . . 11.D[4] . . . (emphasis in original)" Terra Vista answered "no." It further provided "no" responses to Item 2.E.[5] of Part 1 B of the Form ADV, which asked if Terra Vista or "[a]ny *advisory affiliate* or any *management person*[6] [*sic*] currently the subject of . . . [an] administrative *proceeding* involving [investment-related business or activity, fraud, false statement, or omission, theft, embezzlement, dishonest or unethical practices] (emphasis in original)."

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[2] [4] Defined as the applicant's "(1) [c]urrent employees (other than employees performing only clerical, administrative, support or similar functions); (2) all of your officers, partners, or directors . . .; and (3) all persons directly or indirectly controlling you or controlled by you . . ." (Form ADV, Part 1 A, Item 11, Disclosure Information.)

[3] [5] Defined as a formal administrative or civil action initiated by a governmental agency. (Form ADV, Glossary of Terms, ¶ 30.)

[4] [6] Item 11.D., of the Form ADV, Part 1 A, pertains to state regulatory agency actions concerning an advisory affiliate's unethical conduct and/or violations of securities regulations.

[5] [7] Former Item 2.E., now Item 2.F.

[6] [8] Defined as "[a]nyone with the power to exercise, directly or indirectly, a controlling influence over your firm's management or policies, or to determine the general investment advice given to the clients of your firm." (Form ADV, Glossary of Terms, ¶ 19.)

7. Upon receipt of Terra Vista's application a Departmental review of the Central Registration Depository system, which contains the qualification, employment, and disclosure histories of securities employees, showed that Mitchell M. Maynard was then under investigation with the Vermont Securities Administration concerning his activities as principal of LIMCO. Accordingly, on or about January 16, 2002, the Department notified Terra Vista and Respondents, by deficiency letter, of its findings concerning the Vermont Securities Administration's investigation. The Department requested that Mitchell M. Maynard provide all of the details surrounding the investigation and any relevant documentation.

8. On February 2, 2002, Dorice A. Maynard responded to the Department's inquiry by letter, in which she wrote, "[w]e cannot provide much detail about the VERMONT SECURITIES DIVISION investigation. Enclosed please find copies of the only correspondence we have received from them. In Vermont, Mitchell M. Maynard and Dorice A. Maynard were officers and employees of the investment advisor firm [LIMCO], which was also incorporated in the State of Vermont. LIMCO ceased all operations as of January 31, 2001." Dorice A. Maynard duly produced copies of correspondence pertaining to the Vermont Securities Administration investigation concerning LIMCO. The first letter dated July 17, 2001, informed Mitchell M. Maynard that he was under investigation by the Vermont Securities Administration. A second letter, dated August 7, 2001, reiterated the fact that Mitchell M. Maynard was under investigation concerning his activities as the principal of LIMCO.

9. On or about March 6, 2002, the Vermont Securities Administration served Respondents with a notice of intent to seek administrative sanctions against Mitchell M. Maynard and Dorice A. Maynard for violations of Vermont's securities laws concerning their activities as principals of LIMCO. The notice of intent alleged that Respondents had defrauded investors and misappropriated client funds.

10. On April 9, 2002, Dorice A. Maynard faxed the Department a copy of Respondent's answer to the Vermont Securities Administration's notice of intent, dated April 4, 2002. Respondents generally denied all of the allegations contained therein and requested an administrative hearing before a state hearing officer.

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11. Based upon the foregoing events, in lieu of enforcement referral, the Department requested [that] Terra Vista and Respondents withdraw their application, pending the resolution of the Vermont Securities Administration matter. In an email dated August 23, 2002, Dorice A. Maynard requested that Terra Vista's application remain open and that Respondents would make changes to the Form ADV regarding personnel. Pursuant to Respondents' request, the Department held Terra Vista's application open.

12. In August of 2003, during the course of seven days of hearing, the Vermont Securities Administration and Respondents presented the testimony of witnesses, including that of Respondents, and numerous investors, presented documentary evidence, and offered legal argument for the consideration of the hearing officer. At the conclusion of the proceedings, and in light of the evidence offered regarding Respondents' conduct in defrauding investors and the diversion of monies for Respondents' personnel use, the hearing officer recommended that Respondents receive monetary sanctions, be subjected to a permanent bar, make restitution, and pay administrative fines.

13. Respondents contested the hearing officer's recommendation before the Vermont Securities Administration Commissioner. Upon consideration of the evidence, legal argument, and analysis presented by Respondents and the Vermont Securities Administration, the commissioner issued an order on January 3, 2007, barring Respondents from any association or employment with any registered broker-dealer or investment advisor, or any federal [*sic*] covered investment adviser for a five-year period. In addition, Respondents were obligated, jointly and severally, to make restitution to the LIMCO investors in the amount of $400,000 and pay an administrative penalty in the amount of $20,000. Respondent failed to timely appeal the '[Vermont] Commissioner's Findings of Fact, Conclusions of Law, and Order," rendering the order final.

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> 16. On or about January 3, 2007, the Commissioner of the Vermont Securities Administration issued an order barring Respondents from any association or employment with any registered broker-dealer or investment adviser, or any federal [*sic*] covered investment adviser under Vermont's securities laws, for a five-year period. In addition, Respondents were ordered, both jointly and severally, to make restitution to the LIMCO investors in the amount of $400,000 and pay an administrative penalty in the amount of $20,000. The Vermont Securities Administration found that Respondents had engaged in numerous violations of Vermont securities law, including embezzling client funds for personal use, making false and misleading statements to LIMCO investors, engaging in fraudulent, dishonest, and unethical practices. . . .

2. In his Findings of Fact, Conclusions of Law, and Order, the Vermont Commissioner permitted respondents to provide information regarding their ability to pay the restitution and civil penalty. Respondents provided that information to the Vermont Securities Administration on February 2, 2007. They have not yet heard back from the Vermont Securities Administration regarding whether the amount of the restitution and/or civil penalty will be reduced based on an inability to pay. Respondents have not paid any of the restitution or civil penalty[7] pending the decision of the Vermont Securities Administration on that issue.

3. Respondents correctly pointed out that the Vermont discipline was imposed without a finding of scienter, and that the Commissioner reversed the hearing officer on the hearing officer's finding that respondents had engaged in fictitious stock pricing.

4. Although respondents were entitled to an automatic appeal in the Vermont judicial system, they did not avail themselves of that opportunity because they were financially unable to do so.

5. Respondents presently run a software business. They have not engaged in the business of an investment advisor since approximately 2002, and they do not intend to do so in the future. However, they argued, without the support of legal authority, that the Department should not impose a permanent bar on them since the Vermont discipline involved only a five-year bar, and there is insufficient evidence to support a permanent bar in California. Although they are no longer involved in the investment advising business, respondents wish to protect their reputation.

6. Respondents did not offer any evidence of mitigation or rehabilitation.

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[7] According to the Vermont Commissioner's Order, the civil penalty was to be paid only if "there are sufficient resources to support payment of this penalty in addition to restitution."

LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause exists to deny the application for an investment adviser certificate of Mitchell M. Maynard, dba Terra Vista Financial Planners, pursuant to Corporations Code section 25232, subdivisions (d)(3) and (h), as set forth in Factual Findings 1 and 2.

2. Cause exists to bar Mitchell M. Maynard and Dorice A. Maynard from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser pursuant to Corporations Code section 25232.1, as set forth in Factual Findings 1 and 2.

3. Corporations Code section 25232 states in pertinent part:

> The commissioner may, after appropriate notice and opportunity for hearing, by order censure, deny a certificate to, or suspend for a period not exceeding 12 months or revoke the certificate of, an investment adviser, if the commissioner finds that the censure, denial, suspension, or revocation is in the public interest and that the investment adviser, whether prior or subsequent to becoming such, or any partner, officer or director thereof or any person performing similar functions or any person directly or indirectly controlling the investment adviser, whether prior or subsequent to becoming such, or any employee of the investment adviser while so employed has done any of the following:
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> [¶] . . . [¶]
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> (d) Is or has been subject to (1) any order of the Securities and Exchange Commission or the securities administrator of any other state denying or revoking or suspending his or her registration as an investment adviser, or investment adviser representative, or as a broker or dealer or agent, (2) any order of any national securities association or national securities exchange (registered under the Securities Exchange Act of 1934) suspending or expelling him or her from membership in that association or exchange or from association with any member thereof, or (3) any other order of the commission or any administrator, association, or exchange referred to in this subdivision which is or has been necessary for the protection of any investor.
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> [¶] . . . [¶]

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(h) Has violated any provision of this division or the rules thereunder or, in the case of an applicant only, any similar regulatory scheme of the State of California or a foreign jurisdiction.

4. Corporations Code section 25232.1 states:

The commissioner may, after appropriate notice and opportunity for hearing, by order censure, or suspend for a period not exceeding 12 months, or bar from any position of employment, management or control of any investment adviser, broker-dealer or commodity adviser, any officer, director, partner, employee of, or person performing similar functions for, an investment adviser, or any other person, if he or she finds that the censure, suspension or bar is in the public interest and that the person has committed any act or omission enumerated in subdivision (a), (e), (f), or (g) of Section 25232 or has been convicted of any offense or held liable in any civil action specified in subdivision (b) of Section 25232 or is enjoined from any act, conduct or practice specified in subdivision (c) of Section 25232 or is subject to any order specified in subdivision (d) of Section 25232.

5. Respondent Mitchell Maynard argued that, contrary to the allegations made in the Statement of Issues, he did not make a misrepresentation on his Form ADV application with respect to Item 11.G of Part 1 A which inquired as to whether Terra Vista or any advisory affiliate was then the subject of a regulatory proceeding that could lead to a "yes" answer to any part of item 11.D. Mr. Maynard pointed to the definition of "proceeding" which was contained in the glossary accompanying the application. That definition read:

Proceeding: This term includes a formal administrative or civil action initiated by a governmental agency, ***self-regulatory organization*** or ***foreign financial regulatory authority***; a ***felony*** criminal indictment or information (or equivalent formal charge); or a ***misdemeanor*** criminal information (or equivalent formal charge). This term does not include other civil litigation, investigations, or arrests or similar charges effected in the absence of a formal criminal indictment or information (or equivalent formal charge). *[Used in: Part 1 A, Item 11; DRPs; part 1 B, Item 2]* (Emphasis in text.)

6. The term "action" is not defined in the Form ADV glossary. However, according to the definition of "proceeding" contained in the glossary, an "action" does not include an investigation that may (and, in this case, did) lead to a formal charge. In fact investigations are specifically excluded from the definition of "proceeding." Therefore, Respondent Mitchell Maynard is not found to have made a material misrepresentation on his Form ADV application.

7. However, the material misrepresentation alleged in the Statement of Issues is alleged as a factual allegation but not as a specific reason to deny the application for investment advisor certificate or to impose a bar on respondents pursuant to Corporations Code section 25232.1. Complainant's specific reasons for denial and bar are set forth in paragraphs 16 and 22 of the Statement of Issues. Those paragraphs read as follows:

> 16. On or about January 3, 2007, the Commissioner of the Vermont Securities Administration issued an order barring Respondents from any association or employment with any registered broker-dealer or investment adviser, or any federal [*sic*] covered investment adviser under Vermont's securities laws, for a five-year period. In addition, Respondents were ordered, both jointly and severally, to make restitution to the LIMCO investors in the amount of $400,000 and pay an administrative penalty in the amount of $20,000. The Vermont Securities Administration found that Respondents had engaged in numerous violations of Vermont securities law, including embezzling client funds for personal use, making false and misleading statements to LIMCO investors, engaging in fraudulent, dishonest, and unethical practices. Cause, therefore, exists to deny Terra Vista and Respondents' investment adviser application pursuant to Corporations Code section 25232, subdivision (d)(3).
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> [¶] . . . [¶]
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> 22. The Vermont Securities Administration issued a bar order against Mitchell M. Maynard and Dorice A. Maynard on January 3, 2007, thus, Respondents are subject to the provisions of Corporations Code section 25232, subdivision (d)(3), as more fully described above in section III, paragraphs 15-16. Specifically, the Vermont Securities Administration ordered Respondents barred from any association or employment with any registered broker-dealer or investment adviser, or any federal [*sic*] covered investment adviser for a five-year period. Furthermore, Respondents, both jointly and severally, were obligated to make restitution to the LIMCO investors and pay administrative penalties. Cause, therefore, exists under the CSL[8] to bar Respondents from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser pursuant to Corporations Code section 25232.1.

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[8] Corporate Securities Law.

8. The gravamen of respondents' argument regarding the discipline in Vermont was that the California Department of Corporations should not impose more stringent discipline than that imposed in Vermont, especially since the Vermont Securities Administration made a finding that respondents had not acted with scienter. However, respondents did not offer either a legal or factual basis to support their position. They did not dispute the factual findings made by the Vermont Securities Administration. They did not offer any evidence of mitigation. They did not offer any evidence of rehabilitation. They did not attempt to demonstrate how the public interest will be served by the imposition of a bar order equal to or less than that imposed by the Vermont Securities Administration. They did not address the issue of whether any statutory interpretation of Corporations Code section 25232.1 would permit a limited term bar in light of the lack of plain language to that effect in the statute. Finally, they did not address the independence of each state's agency assigned to regulate the securities industry within that state to determine its own sanctions and discipline in the interest of the citizens of that particular state. Absent a legal and/or factual basis for imposing an alternative order, a discretionary order of any state will stand independent of orders made in sister states.

9. Respondents bore the burden of proof in this case. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113 [179 Cal.Rptr. 351]; *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205 [97 Cal.Rptr.2d 467]; *Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 238 [340 P.2d 1]; *Southern California Jockey Club, Inc. v. California Horse Racing Board* (1950) 36 Cal.2d 167, 177 [223 P.2d 1].) They failed to sustain that burden.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The application of Mitchell M. Maynard, dba Terra Vista Financial Planner for an investment adviser certificate is denied.

2. Respondents, Mitchell M. Maynard and Dorice A. Maynard are barred from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser.

DATED: August 15, 2007

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings