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BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of:

AGRICULTURAL CONTRACTING SERVICES
ASSOCIATION, INC., dba AMERICAN LABOR
ALLIANCE WORKERS' COMPENSATION
FUND & TRUST, dba COMPONE USA, and
MARCUS ASAY,

Respondents.

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PROPOSED DECISION

Statement of the Case

The California Department of Insurance (CDI or Department) brought this proceeding against Agricultural Contracting Services Association, Inc., doing business as American Labor Alliance Workers' Compensation Fund & Trust and as CompOne USA (collectively, ALA), and Marcus Asay (together with ALA, Respondents).

On November 10, 2017, the Insurance Commissioner issued a decision finding Respondents acted in a capacity for which a license, registration, or certificate of authority from the Commissioner was required but not possessed, in violation of the

Insurance Code.¹ Specifically, Respondents solicited, marketed and transacted workers' compensation insurance without the requisite authority.²

Following that decision, the Commissioner issued an Order to Show Cause (OSC) that is now before this tribunal. The OSC requires Respondents to demonstrate why the Commissioner should not impose a penalty on Respondents under Insurance Code section 12921.8, subdivision (a)(3)(B). That subdivision authorizes monetary penalties against persons who have acted in a capacity for which a license, registration, or certificate of authority from the Commissioner was required but not possessed.

The Department argues that Respondents are subject to a section 12921.8 penalty exceeding \$3,000,000 as a result of their unlawful marketing and transaction of workers' compensation insurance. Respondents argue that section 12921.8's penalty provisions are unconstitutional. They further argue that even if the statute were constitutional, it does not authorize the significant penalty the Department seeks.

For the reasons discussed below, the Chief Administrative Law Judge (CALJ) finds Insurance Code section 12921.8, subdivision (a)(3)(B) mandates a \$4,345,000 penalty.

Statement of Issues

1. May the Commissioner impose a monetary penalty on Respondents under Insurance Code section 12921.8, subdivision (a)(3), and, if so, in what amount?

¹ Order Adopting Proposed Decision *In the Matter of Agricultural Contracting Services Association et al.* (Cal. Ins. Comm'r, Nov. 10, 2017, VA-2016-00137) (*ALA I*). *ALA I* is designated precedential under Government Code section 11425.60, subdivision (b).

² *Id.* at pp. 34-35.

Procedural History

On December 22, 2016, the Commissioner issued an Amended Order to Cease and Desist and Notice of Right to Hearing (Cease and Desist Order), alleging the Respondents unlawfully acted in a capacity for which a license, registration, or certificate of authority from the Commissioner was required but not possessed. At Respondents' request, CDI's Administrative Hearing Bureau (AHB) held a hearing on the Cease and Desist Order on February 15 and 16, 2017. On November 10, 2017, the Commissioner issued an Order Adopting Proposed Decision *In the Matter of Agricultural Contracting Services Association et al. (ALA I)*.³ In *ALA I*, the Commissioner determined that Respondents were acting capacity for which a license, registration, or certificate of authority from the Commissioner was required but not possessed, in violation of Insurance Code sections 700 and 1631.⁴ Accordingly, the Commissioner again ordered Respondents to cease and desist from acting in that capacity.⁵

On January 31, 2018, the Commissioner issued the OSC requiring Respondents to show cause why the Commissioner should not impose a penalty on Respondents under Insurance Code section 12921.8, subdivision (a)(3)(B). On February 8, 2018, the AHB issued a Notice of Hearing on the OSC, setting March 15, 2018, as the hearing date. Also on February 8, 2018, the CALJ issued a Notice of Intent to Take Official Notice of the Commissioner's decision in *ALA I* and the evidentiary record in that proceeding. On February 22, 2018, the CALJ issued an Order Taking Official Notice of those materials.

At the parties' request, the CALJ issued an Order Granting Continuance and an Amended Notice of Hearing, rescheduling the OSC hearing for April 26, 2018.

³ *ALA I, supra*.

⁴ *Id.* at pp. 35-36.

⁵ *Id.* at pp. 36-37.

On April 26, 2018, the CALJ conducted the evidentiary hearing in the CDI's San Francisco hearing room. Teresa R. Campbell, Esq. appeared on CDI's behalf. Charles Manock, Esq. of Manock Law appeared on Respondents' behalf. Thomas Johnson testified for CDI. Antonio Gastelum and Marcus Asay testified for Respondents. The evidentiary record includes: (1) the foregoing testimony; (2) the officially noticed materials described above; (3) the parties' pre-filed exhibits, as identified on their respective exhibit lists; (4) Exhibits 300⁶ and 301; and (5) ALJ Exhibits 1 through 4.

On June 7, 2018, the CALJ issued a Post-Hearing Order for Additional Evidence pursuant to Government Code sections 11445.40 and 11512. Therein, the CALJ ordered CDI to produce its investigation notes and ordered Respondents to produce, among other things, a full and complete list of Omega Community Labor Union's (Omega) employer members. On June 21, 2018, the CDI filed ALJ Exhibit 1 as ordered. On that same date, Respondents objected to the CALJ's Post-Hearing Order, arguing it was obligated to provide only those documents already publicly available. In addition, Respondents argued could not provide any information regarding Omega "because Respondents do not have any management interest" in Omega.⁷

Following receipt of additional evidence and the parties' post-hearing briefs, the ALJ closed the evidentiary record on October 15, 2018.

⁶ The CALJ conditionally sealed Exhibit 300 in the record, as it contains Mr. Asay's personal financial information. (See Tr. 92:8-15.) The CALJ notes that no Protective Order has been received.

⁷ Respondents filed limited information in response to the CALJ's Order, identified as ALJ Exhibits 2, 3 and 4.

Findings of Fact

The CALJ makes the following factual findings based on a preponderance of the evidence in the record:⁸

I. Respondents' Organization

A. ALA

Founded in 2007 by Marcus Asay, Agricultural Contracting Services Association, doing business as American Labor Alliance Workers' Compensation Fund & Trust, is a non-profit Nevada corporation.⁹ ALA headquarters is 2491 Alluvial Avenue, Suite 170, Clovis, California.¹⁰ As a non-profit corporation, ALA does not issue shares of stock.¹¹

ALA is governed by a board of trustees, of which Mr. Asay is the chair.¹² In 2017, Marcus Asay served as ALA's chief executive officer and chief financial officer, Antonio Gastelum served as its chief operating officer, and Harold Zapata served as its chief benefits officer.¹³

ALA's purpose is to provide employment benefits to agricultural employers and their employees.¹⁴ Those benefits include workers' compensation insurance.¹⁵ From 2015 through 2017, ALA issued workers' compensation insurance jointly with its subsidiary CompOne USA Interinsurance Service Company, a for-profit Texas corporation (CompOne).¹⁶ Mr. Asay signed the insurance policy declarations on behalf of both ALA

⁸ Evidentiary Hearing Reporter's Transcript of Proceedings of April 26, 2018 is identified as "Tr."

⁹ *ALA I, supra*, at p. 5.

¹⁰ Exh. 100 at p. 100-004.

¹¹ See Nev. Rev. Statutes, § 82.136.

¹² *ALA I, supra*, at p. 6.

¹³ *Ibid.*; Exh. 100 at p. 100-004.

¹⁴ *ALA I, supra*, at p. 5.

¹⁵ *Id.* at p. 11-13.

¹⁶ *ALA I* evidentiary hearing exhibits (*ALA I* Exh.) 3, 4, 6.

and CompOne.¹⁷ At no time has ALA or CompOne possessed a license or other authority from the Commissioner to market or transact insurance.¹⁸

As of February 2018, 14 months after the CDI's Cease and Desist Order and three months after the Commissioner's decision, several ALA clients continued to pay ALA for workers' compensation insurance,¹⁹ even though the Commissioner had repeatedly ordered ALA to cease and desist soliciting, marketing and transacting insurance.²⁰

B. Omega

Omega Community Labor Union is a California nonprofit mutual benefit corporation, incorporated on July 24, 2017.²¹ From August 25, 2017, through at least February 20, 2018, Omega's principal place of business was located at 2491 Alluvial Avenue, Suite 170 in Clovis, California, the same address as ALA.²²

Mr. Asay was Omega's sole incorporator.²³ Antonio Gastelum served as Omega's chief executive officer and chief financial officer between August 25, 2017, and September 6, 2017.²⁴ On November 2, 2017, Harold Zapata became Omega's chief executive officer.²⁵ Beginning in April 2018, Mr. Gastelum provided payment processing, financial reporting and infrastructure services to both Omega and ALA.²⁶ Also as of that date, Mr. Gastelum supervised a team of 10 individuals who provided

¹⁷ *Ibid.*

¹⁸ *ALA I, supra*, at p. 6.

¹⁹ ALJ Exh. 1 at p. 2.

²⁰ Amended Cease and Desist Order, dated December 22, 2016 (Cease and Desist Order), at pp. 7-8; *ALA I, supra*, at pp. 36-37.

²¹ Exh. 102 at p. 102-001.

²² Exh. 100 at p. 100-004; Exh. 102 at pp. 102-002, 102-003, 102-004. Mr. Gastelum testified that Omega is no longer located in the same space as ALA. (Tr. 55:17-24.) Respondents provided no evidentiary support for this claim. Nonetheless, as of the OSC date, Omega and ALA shared the same location.

²³ Exh. 102 at p. 102-001.

²⁴ *Id.* at p. 102-002.

²⁵ *Id.* at p. 102-003.

²⁶ Tr. 77:11-78:1.

services to both Omega and ALA.²⁷ Those individuals and Mr. Gastelum comprised approximately one-third of Omega's workforce. Nevertheless, Omega did not formally employ Mr. Gastelum. As previously noted, Mr. Gastelum provides services to both ALA and Omega under a contract with Mr. Asay.²⁸ In addition, for the first several months of Omega's operation, Omega did not formally employ any members of its workforce or management, instead relying entirely on contracted workers.²⁹

Respondents established and operated Omega to evade their obligations to stop marketing and transacting workers' compensation insurance, as required by the Cease and Desist Order and *ALA I*.³⁰ After the Commissioner issued the Cease and Desist Order, Omega's representatives issued certificates of liability insurance that were substantially identical to those previously issued by ALA.³¹ For example, in November 2017, an ALA client "was contacted by the person that he normally dealt with at [American] Labor Alliance and was told that there was a new program through Omega Community Labor and that his employees needed to sign registration cards to be eligible for this program. So he did so and he continued making payments as he always did to—he wasn't sure it was the same entity, but he continued to pay the same amount for insurance."³² And lastly, Mr. Gastelum admitted Omega took over ALA clients when he testified that "Omega . . . was engaged to [e]nsure seamless participation in the benefit programs that these employees and employers were relying on that were put in jeopardy

²⁷ Tr. 109:2-110:21, 111:10.

²⁸ Tr. 77:1-78:15.

²⁹ Tr. 108:25-110:21.

³⁰ Tr. 63:2-6. See part I(B) of the Applicable Law and Analysis section below.

³¹ Compare Exh. 104 and 107 with *ALA I* Exh. 2 at p. 2-3 and *ALA I* Exh. 305. At least one of Omega's insurance certificates was signed by Mr. Asay as Omega's "authorized representative." (Exh. 107)

³² Tr. 19:5-13.

by being associated with A.L.A. . . .³³ In sum, Omega served as a conduit for ALA's prohibited workers' compensation operations from November 2017 onward.³⁴ And like ALA, Omega has never possessed any license or authority from the Commissioner to market or transact insurance.

C. World Workforce International

World Workforce International (WWI) is a membership organization purporting to be a "federation of unions" helping to organize employees.³⁵ WWI has four U.S. members, two of which are Omega and ALA.³⁶ Mr. Asay is WWI's co-founder and chair of the board.³⁷ WWI's board includes two other individuals, one of whom was previously an ALA board member.³⁸ ALA's entire physical presence consists of just one desk—that of Mr. Asay.³⁹

II. Respondents' Workers' Compensation Insurance Policies

Respondents issued several workers' compensation insurance policies, one or more of which were in effect on each day from December 10, 2015 through March 1, 2018.⁴⁰ In addition, Omega issued workers' compensation insurance policies, one or more of which were in effect on each day from November 4, 2017 through the April 26, 2018 hearing date.⁴¹

The period from December 10, 2015 through April 26, 2018 covers 869 days.

³³ Tr. 63:2-6.

³⁴ See part I(B)(1) of the Applicable Law and Analysis section below.

³⁵ Tr. 73:18-19, 94:15-95:8.

³⁶ Tr. 98:5-99:1.

³⁷ Tr. 74:9-15, 94:1-7.

³⁸ Tr. 95:17-96:3.

³⁹ Tr. 102:5-7.

⁴⁰ Tr. 71:7-73:12; Exh. 107; *ALA* / Exh. 3, 4, 6, 305.

⁴¹ Tr. 71:7-73:12; Exh. 104; Exh. 107.

Applicable Law and Analysis

The Department argues Respondents are subject to penalty under Insurance Code section 12921.8, subdivision (a)(3)(B), for transacting insurance in California without authorization, whether under ALA's name or Omega's.⁴² The Department further argues that subdivision (a)(3)(B) requires the that CALJ presume Respondents continuously acted in a prohibited capacity from the date they first transacted insurance without authority.⁴³ As a result, CDI contends Respondents are subject to a monetary penalty of \$5,000 for every day from the date of the first prohibited action until the present.⁴⁴

Respondents argue that section 12921.8's penalty provisions are unconstitutional, both on their face and as applied to this case.⁴⁵ Respondents also contend that they overcame section 12921.8's presumption of continuous violation and that they did not continuously act in a capacity for which the Commissioner's authority was required but not possessed.⁴⁶ Finally, Respondents argue that section 12921.8 does not authorize penalties for violations occurring after the date of the Cease and Desist Order.⁴⁷

Each of these arguments is addressed below.

I. Omega and ALA Are a Single Enterprise

The Department argues that Omega and ALA must be treated as one entity for the purposes of imposing a monetary penalty under Insurance Code section 12921.8.⁴⁸

Respondents disagree and maintain that Omega is separate from ALA. The CALJ finds the CDI's argument more persuasive.

⁴² CDI's Closing Brief, filed June 11, 2018 (CDI Closing Br.), at p. 2:10-25.

⁴³ CDI Reply Brief, filed June 28, 2018 (CDI Reply Br.), at pp. 7:6-9:6.

⁴⁴ *Ibid.*

⁴⁵ Respondents' Post-Hearing Brief for Penalty Phase, filed June 11, 2018 ("Resp. Post-Hearing Br."), at pp. 2:4-6:13.

⁴⁶ Respondents' Reply Brief, filed June 28, 2018 ("Resp. Reply Br."), at (unnumbered) pp. 3:23-5:26

⁴⁷ Resp. Post-Hearing Br. at pp. 8:6-9:18.

⁴⁸ CDI's Closing Br. At p. 2:10-25.

A. Applicable Law

Ordinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers and directors.⁴⁹ But under the “single enterprise” or “alter ego” doctrine, courts may disregard that legal separation where a corporation is used by an individual or other corporation to accomplish a wrongful purpose.⁵⁰

Two conditions are generally required to apply the doctrine to related corporations: (1) such a unity of interest and ownership that the separate corporate personalities are merged, so that one corporation is a mere adjunct of another or the two companies form a single enterprise; and (2) an inequitable result if the acts in question are treated as those of one corporation alone.⁵¹ The ownership requirement does not apply where a corporation has no shareholders.⁵²

There is no litmus test for applying the doctrine, and the result will depend on the circumstances of each case.⁵³ The trial court may consider factors such as the commingling of funds and assets of the two entities, use of the same offices and employees, disregard of corporate formalities, identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other.⁵⁴ No one characteristic governs. Instead, the courts must look at all the circumstances to determine whether the doctrine should be applied.⁵⁵ The ultimate issue “is whether in the particular case presented, justice and equity can best be accomplished and fraud and unfairness defeated by

⁴⁹ *Toho-Towa Co., Ltd. v. Morgan Creec Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1106.

⁵⁰ *Ibid.*

⁵¹ *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1219.

⁵² See *id.* at p. 1219, fn. 7 [ownership element not applicable to unincorporated business organization of subscribers who appointed an alter-ego manager].

⁵³ *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.

⁵⁴ *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.*, *supra*, 217 Cal.App.4th at p. 1108.

⁵⁵ *Ibid.*

disregarding the distinct entity of the corporate form.”⁵⁶

B. Analysis and Conclusions

1. Respondents Used Omega for a Wrongful Purpose.

Respondents established and operated Omega to evade ALA’s obligations under the Cease and Desist Order and *ALA I*. Specifically, Respondents use Omega to market and sell the same workers’ compensation insurance the Commissioner ordered ALA to stop selling. Respondents’ witness, Antonio Gastelum, admitted as much when he testified that “Omega . . . was engaged to [e]nsure seamless participation in the benefit programs that these employees and employers were relying on that were put in jeopardy by being associated with A.L.A. . . .”⁵⁷

Respondents effected this “seamless” insurance by instructing ALA’s clients to “sign membership applications to become part of Omega Community Labor Association in order to keep receiving W[orkers’] C[ompensation] coverage.”⁵⁸ At least one ALA client followed those instructions. The Department’s investigator testified that, in November 2017, the client “was contacted by the person that he normally dealt with at [American] Labor Alliance and was told that there was a new program through Omega Community Labor and that his employees needed to sign registration cards to be eligible for this program. So he did so and he continued making payments as he always did to—he wasn’t sure it was the same entity, but he continued to pay the same amount for insurance.”⁵⁹ In addition, after the date of the Cease and Desist Orders, Omega’s representatives issued certificates of liability coverage nearly identical to those earlier

⁵⁶ *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993.

⁵⁷ Tr. 63:2-6.

⁵⁸ ALJ Exh. 1 at p. 2.

⁵⁹ Tr. 19:5-13.

issued by ALA.⁶⁰ Thus, the CALJ concludes that Respondents used Omega for the wrongful purpose of circumventing the Commissioner's orders to cease and desist from transacting insurance.

2. ALA and Omega Share a Unity of Interest.

ALA, a Nevada non-profit corporation, and Omega, a California non-profit mutual benefit corporation, do not issue shares and thus have no "owners."⁶¹ As such, the alter ego doctrine's ownership requirement does not apply.⁶² Nevertheless, the factors enumerated in *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.*⁶³ establish that ALA and Omega share a unity of interest such that Omega is a mere adjunct of ALA.⁶⁴

a. Commingled Funds

Respondents commingled ALA and Omega's funds. Mr. Gastelum testified that from November 2017 onward ALA no longer sold workers' compensation coverage and that only Omega did so.⁶⁵ But as of February 2018, several clients were still paying ALA for the coverage.⁶⁶ By receiving payments belonging to Omega, ALA commingled the two entities' funds.

⁶⁰ Compare Exh. 104 with *ALA I* Exh. 2 at p. 2-3 and *ALA I* Exh. 305.

⁶¹ See Nev. Rev. Statutes, § 82.136; Cal. Corp. Code, § 7110 et seq.

⁶² See *Tran v. Farmers Group, Inc.*, *supra*, 104 Cal.App.4th 1202, 1219, fn. 7.

⁶³ *Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.*, *supra*, 217 Cal.App.4th at pp. 1108-1109.

⁶⁴ The Department has not alleged that ALA or Omega is Marcus Asay's alter ego. (See CDI Closing Br. at p. 2:10-25.) Nor does the evidence demonstrate they are. The alter ego doctrine may apply to an individual only if "there is such [a] unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist." (*CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 788.) While Mr. Asay has a significant role in both ALA and Omega, both corporations have other managers and workers, as well as offices separate from Mr. Asay's residence. In addition, there no evidence in the record that Mr. Asay made personal use of corporate assets or funds. (See *id.* at p. 789 ["[C]ourts often consider commingling of funds, personal use of corporate assets, inadequate corporate records, lack of employees, offices, or operating funds, and inadequate capitalization."].) Accordingly, the ALJ concludes that ALA and Omega's personality did not merge with Mr. Asay's.

⁶⁵ Tr. 58:19-59:5, 82:19-83:4.

⁶⁶ ALJ Exh. 1 at p. 2.

b. Same Offices and Workers

ALA and Omega shared offices at 2491 Alluvial Avenue, Suite 170, Clovis, California. Both entities also had several workers in common.⁶⁷ For example, Antonio Gastelum is responsible for ALA's financial reporting and payment processing, and provides similar services for Omega.⁶⁸ Mr. Gastelum also testified that the ten members of his team working for Omega also provide services ALA.⁶⁹ Those individuals make up approximately one-third of Omega's workforce.⁷⁰

c. Disregard of Corporate Formalities

Respondents disregarded corporate formalities in ALA and Omega's hiring practices. For example, neither ALA nor Omega formally employs Mr. Gastelum even though he works for both entities and was Omega's chief executive officer and chief financial officer. Instead, Mr. Gastelum performs his services pursuant to a contract with Marcus Asay.⁷¹ In addition, Omega did not formally employ any members of its management or workforce for the first several months of operations, relying instead on contracted workers.⁷²

d. Overlapping Management and Control

ALA, WWI and Omega's management is tightly enmeshed. Mr. Asay is ALA's Board chair, Omega's sole incorporator and Omega's authorized representative on insurance certificates.⁷³ He also is WWI's Board chair and co-founder.⁷⁴ WWI's board

⁶⁷ Respondents' witness Mr. Gastelum testified that Omega used only independent contractors in 2017 and had no employees until 2018. (Tr. 107:2-21.)

⁶⁸ Tr. 76:11-13, 77:11-78:1, 78:11-15.

⁶⁹ Tr. 111:10.

⁷⁰ Tr. 109:2-110:21.

⁷¹ Tr. 77:1-78:15; Exh. 102 at p. 102-002; *ALA I, supra*, at p. 6.

⁷² Tr. 108:25-110:21.

⁷³ *ALA I, supra*, at p. 6; Exh. 101; Exh. 107.

⁷⁴ Tr. 74:9-15, 94:1-7.

consists of two other individuals, one of whom was previously an ALA board member.⁷⁵ WWI is a membership organization with only four U.S. members, two of which are Omega and ALA.⁷⁶ In addition, as noted above, Mr. Asay directly contracts with Mr. Gastelum to provide services to both ALA and Omega. Mr. Asay thereby has significant control over Omega's operations, given that Mr. Gastelum and his team constitute a large portion of Omega's workforce.⁷⁷ Further, Mr. Gastelum was formerly ALA's chief operating officer and Omega's chief executive officer and chief financial officer.⁷⁸ Finally, Harold Zapata replaced Mr. Gastelum as Omega's chief executive.⁷⁹ Mr. Zapata is also ALA's Chief Benefits Officer.⁸⁰

e. Omega Is a Conduit for ALA

Respondents formed and used Omega simply as a conduit for ALA's prohibited insurance business. As noted above, Omega's purpose was to ensure clients' "seamless participation" in workers' compensation insurance the Commissioner ordered ALA to stop marketing and selling.⁸¹

Taken together, the above factors demonstrate that ALA and Omega share "such a unity of interest and ownership" that the "one corporation is a mere adjunct of" the other.⁸² As the Department's investigator concluded, Respondents "just re-branded themselves and started a new company and working out of the same addresses with the same people and continued to operate in a very similar manner as American Labor

⁷⁵ Tr. 95:17-96:3.

⁷⁶ Tr. 98:5-99:1.

⁷⁷ Tr. 77:1-78:15, 109:2-110:21.

⁷⁸ *ALA I, supra*, at p. 6; Exh. 102 at p. 102-002.

⁷⁹ Exh. 102 at p. 102-3.

⁸⁰ *ALA I, supra*, at p. 6.

⁸¹ Tr. 63:2-6; Exh. 106 at p. 106-1.

⁸² *Tran v. Farmers Group, Inc., supra*, 104 Cal.App.4th at p. 1219.

Alliance did.”⁸³

3. Inequity Would Result from Treating Omega as a Separate Entity.

There is no question that inequity would result from treating Omega and ALA as separate entities. Doing so would enable Respondents to evade the Commissioner’s cease and desist orders by simply incorporating a new entity to carry on their unlicensed and prohibited insurance activities. That would substantially diminish the Commissioner’s ability to enforce California’s insurance laws. In light of ALA and Omega’s unity of interest, such inequity requires treating ALA and Omega as a single enterprise.

II. ALA Continuously Violated the Insurance Code, Mandating a \$4,345,000 Penalty Under Section 12921.8(a)(3)(B).

A. This Tribunal May Not Decide Section 12921.8’s Constitutionality

Respondents argue Insurance Code section 12921.8, subdivision (a)(3)(B) is unconstitutional on its face and as applied.⁸⁴ The Department contends that this administrative tribunal is an improper forum for those arguments.⁸⁵ The CDI’s legal analysis is correct.

1. Applicable Law

California Constitution, article III, section 3.5 provides that an administrative agency, including an agency created by the Constitution or an initiative, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

⁸³ Tr. 24:13-16.

⁸⁴ Resp. Post-Hearing Br., at p. 1:22-24.

⁸⁵ CDI Reply Br. at p. 3:10-20.

This prohibition does not affect an agency's ability to interpret existing law nor does it impact their enforcement of agency rules.⁸⁶

2. Analysis

Contrary to Respondents' argument, the CALJ lacks the power to declare Insurance Code section 12921.8 unconstitutional. Article III, section 3.5 of the California Constitution prohibits administrative agencies from declaring statutes unconstitutional. It also prohibits administrative agencies from finding a statute unenforceable on constitutional grounds unless an appellate court has found the statute unconstitutional.⁸⁷ Since no appellate court has declared section 12921.8, or any part thereof, unconstitutional, this tribunal must presume the statute is constitutional and apply it to this case.⁸⁸

B. ALA Engaged in Continuous Prohibited Activity

CDI argues the CALJ must presume Respondents' continuously acted in a prohibited capacity from the date Respondents first transacted insurance without authority. Respondents contend that they overcame section 12921.8's presumption of continuous violation and that they did not continuously act in a capacity for which the Commissioner's authority was required but not possessed.⁸⁹

1. Applicable Law

Insurance Code section 12921.8, subdivision (a) provides that the Commissioner may issue a cease and desist order to a person acting in a capacity for which a license or certificate is required, but not possessed. The statute further permits the Commissioner,

⁸⁶ *Regents of University of California v. Public Employment Relations Bd.* (1983) 139 Cal.App.3d 1037.

⁸⁷ Cal. Const., art. III, § 3.5; *Lockyer, supra*, at pp. 1094-1095.

⁸⁸ See *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086 [statutes are presumed constitutional].

⁸⁹ Resp. Reply Br. at (unnumbered) pp. 3:23-5:26.

pursuant to an order to show cause, to impose a monetary penalty on those who act in a capacity for which a license or certificate is required but not possessed.⁹⁰ The monetary penalty shall be the greater of the following:

(A) Five times the amount of money received by the person for acting in the capacity for which the license, registration, or certificate of authority was required but not possessed.

(B) Five thousand dollars (\$5,000) for each day the person acted in the capacity for which the license, registration, or certificate of authority was required but not possessed. In the absence of contrary evidence, it shall be presumed that a person continuously acted in a capacity for which a license, registration, or certificate of authority was required on each day from the date of the earliest such act until the date those acts were discontinued, as proven by the person at the hearing.

2. Analysis and Conclusions

Respondents contend they overcame section 12921.8's presumption of continuous activity and demonstrated they did not act unlawfully in a continuous manner. Even assuming Respondents overcame the presumption, a preponderance of evidence demonstrates Respondents continuously acted in a capacity for which a license or certificate was required.

In *ALA I*, the Commissioner determined that Respondents acted in a capacity for which a license or certificate was required.⁹¹ Specifically, the Commissioner determined Respondents "transacted insurance without a certificate of authority in violation of Insurance Code section 700."⁹² Evidence in this proceeding demonstrates ALA and/or

⁹⁰ Ins. Code, § 12921.8, subd. (a)(3).

⁹¹ *ALA I*, *supra*, at p. 35.

⁹² *Ibid.* Insurance Code section 700 provides, in relevant part: "A person shall not transact any class of insurance business in this state without first being admitted for that class. Except for the State Compensation Insurance Fund . . . , admission is secured by procuring a certificate of authority from the

Omega continued to transact insurance without a certificate after *ALA I*. Policy declarations and certificates of liability insurance issued by ALA and Omega demonstrate that one or more ALA or Omega policies were in force from December 10, 2015, through the hearing date of April 26, 2018.⁹³ Since workers' compensation policies are executory contracts with obligations that carry on uninterrupted while the policies are in force, an insurer continues to transact with the insured until the parties' obligations conclude after the policy expires.⁹⁴ That covers a period of 869 days during which ALA or its alter ego, Omega, continuously transacted insurance without a certificate of authority in violation of Insurance Code section 700. Accordingly, the penalty imposed on ALA⁹⁵ under section 12921.8, subdivision (a)(3)(B), is \$4,345,000.⁹⁶

C. Section 12921.8 Penalties are Calculated from the First Violation Date through the Hearing Date

Respondents argue that the Commissioner may not impose a penalty for violations occurring after the date of the Cease and Desist Order.⁹⁷ Specifically, Respondents argue that Insurance Code section 12921.8 "requires that the temporal scope of both the cease and desist order and the order to show cause is the same and extends only to the date of the cease and desist order."⁹⁸ Respondents' argument is unconvincing.

Nothing in section 12921.8, or any other Insurance Code provision, requires the

commissioner." The Commissioner also determined that Respondents solicited, marketed and effected insurance contracts without a license, in violation of Insurance Code section 1631. (*Ibid.*)

⁹³ Exh. 104; *ALA I* Exh. 3, 4, 6, 305.

⁹⁴ See *State Compensation Insurance Fund v. WallDesign Inc.* (2011) 199 Cal.App.4th 1525, 1529-1530 [Workers' compensation insurance policies were executory because "they could not be fully performed by either party until after their expiration."].

⁹⁵ The penalty is imposed on ALA and not on Marcus Asay. The record fails to establish that Mr. Asay transacted, solicited, marketed or effected insurance in any capacity other than as a representative of ALA (See *ALA I* Exh. 2, 3, 5, 6 [signed by Mr. Asay as ALA's representative].)

⁹⁶ 869 days x \$5,000/day = \$4,345,000. The CALJ applies the penalty under section 12921.8, subdivision (a)(3)(B), because the Department failed to argue or demonstrate whether a higher penalty applies under subdivision (a)(3)(A).

⁹⁷ Resp. Post-Hearing Br. at pp. 8:6-9:18.

⁹⁸ *Id.* at p. 8:15-16.

Commissioner to issue an order to show cause for penalty purposes at the same time a cease and desist order issues. Nor does the statute suggest that penalties may not extend beyond the date of the cease and desist order. Rather, both the statute's plain language and the legislative history indicate the opposite.⁹⁹ Indeed, the legislative history demonstrates that the Commissioner may impose section 12921.8 penalties *irrespective* of whether a cease and desist order issues.¹⁰⁰ Thus, contrary to Respondents' argument, a section 12921.8 order to show cause need not coincide with a related cease and desist order.

In addition, the statute authorizes penalties "from the date of the earliest [prohibited] act until the date those acts were discontinued, as proven by the person at a hearing." This language indicates that section 12921.8's penalties apply to all daily violations through the OSC hearing date.

D. Penalties May Exceed the Order to Show Cause's Prayer

Respondents argue that Insurance Code section 12921.8 penalties may not exceed the \$3,355,000 specified in the OSC.¹⁰¹ Respondents' contention is incorrect.

Case law concerning civil court pleadings is instructive. In a contested case the plaintiff may secure relief greater than that prayed for.¹⁰² "[T]he prayer is not part of the

⁹⁹ Sen. Rules Com. Analysis of Sen. Bill 706 (2005-2006 Reg. Sess.) Jul. 12, 2005 ["[I]t is important to have an administrative remedy that as much as possible deters such unlicensed conduct, i.e. by a fine. *Currently*, the law allows the unlicensed person to operate until the I[n]surance C[ommissioner] issues a C[ease]&D[esist], and the person gets to keep the proceeds from their unlicensed activity. The D[e]partment O[f] I[n]surance can only fine the unlicensed entity *if it continues to engage in insurance activity after the C&D*."]. Emphasis added.

¹⁰⁰ *Ibid.*

¹⁰¹ Resp. Post-Hearing Br. at p. 9:14-18.

¹⁰² *Dicker v. Bisno* (1957) 155 Cal.App.2d 554, 558; see also Code Civ. Proc., § 580, subd. (a) ["The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint . . . ; but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. . . ."].

complaint if it appears from the body of the complaint what relief is sought.”¹⁰³ While the OSC’s prayer requested a monetary penalty of \$3,355,000, the OSC states more broadly that “Respondents are ordered to appear before the Commissioner on a date to be determined and show cause, if any there be, why the Commissioner should not issue an Order imposing a penalty as set forth in Insurance Code §12921.8(a)(3)(B).”¹⁰⁴ The OSC further sets forth the statutory penalty of \$5,000 for each day a person transacts insurance without a certificate of authority.¹⁰⁵ Thus, the OSC provided Respondents adequate notice that they potentially faced penalties exceeding \$3,355,000. Because the OSC sets forth the scope of possible penalties under section 12921.8, subdivision (a)(3), and because Respondents appeared and contested the order, Respondents are subject to all penalties authorized under that subdivision.

Conclusions of Law

Based on the foregoing facts and analysis, the CALJ concludes as follows:

1. ALA and Omega are a single enterprise for the purposes of this proceeding.
2. During each of the 869 days from December 10, 2015 through April 26, 2018, ALA or its alter ego Omega transacted insurance without a certificate of authority from the Commissioner. During each of those days, ALA thereby acted in a capacity for which a certificate of authority was required but not possessed, in violation of Insurance Code section 700.
3. ALA is liable for a monetary penalty of \$4,345,000 under section 12921.8,

¹⁰³ *United States v. Fallbrook Public Utility Dist.* (S.D. Cal. 1951) 101 F.Supp. 298, 301 [discussing California law].

¹⁰⁴ OSC at p. 2:21-23.

¹⁰⁵ *Id.* at pp. 22:26-23:10.

subdivision (a)(3)(B), representing \$5,000 for each of the 869 days that ALA or its alter ego Omega acted in a capacity for which a certificate of authority was required but not possessed.

ORDER

IT IS ORDERED:

1. ALA shall pay the Commissioner forthwith a monetary penalty of \$4,345,000.
2. All orders set forth in *ALA I* remain in effect.

* * *

I submit this Proposed Decision based on the evidentiary hearing, records and files in this matter, and recommend its adoption as the decision of the Insurance Commissioner of the State of California.

Dated: November 29, 2018



KRISTIN L. ROSI
Chief Administrative Law Judge
Administrative Hearing Bureau
California Department of Insurance